Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1998

ESTATE OF BESSIE I. MUELLER, DECEASED,
JOHN S. MUELLER AND MILTON W. BUSH, SR.,
PERSONAL REPRESENTATIVES,

Petitioners,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

Whether the Tax Court of the United States has jurisdiction to consider an affirmative defense of equitable recoupment?

Parties to the Proceeding

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Table of Contents

Page

Questions Presented For Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Citation to Opinions and Orders 1

Basis for Supreme Court Jurisdiction 1

United States Statutes Involved in the Case 1

Statement of the Case 1

Arguments in Support of Petition 3

A. Significance of Case to Administration of Tax Laws 3

1. Case involves whether decisions by lower courts during the past fifty years denying Tax Court jurisdiction over equitable recoupment defense claims are correct. 3

2. Case involves issue reserved for consideration by Supreme Court Justices in 1990. 4

3. Case involves conflict in rationale between only two Supreme Court rulings on equitable recoupment jurisdiction. 5

4. Case raises important jurisdictional issue which is not frequently presented for review. 5

B. Decision of Court of Appeals Below Denying Jurisdiction of Tax Court to Consider Affirmative Defense of Equitable Recoupment 6

C. Tax Court as a Statutory Court Without Authority to Consider Equitable Claims 7

D. Statutory Limitation Under Code § 6214(b) on Jurisdiction of Tax Court as Reason for Denial of Jurisdiction 11

1. Purpose of statute was not to deny Tax Court equitable recoupment jurisdiction. 12

2. Language of statute does not cover equitable recoupment. 14

3. Dalm case rationale excludes equitable recoupment from statute. 15

E. The Gooch Milling Case 16

1. Ambiguity in application to equitable recoupment claims. 17

2. *Dalm* case rationale mutually inconsistent with *Gooch Milling* 18

VI. Conclusion 22

Appendix

Exhibit A - Judgment 1a

Exhibit B - Circuit Court Opinion 2a

Exhibit C - Tax Court Opinion 13a

Exhibit D - Statutory & Constitutional Provisions 44a

Table of Authorities

Page

Cases

Appeal of Banna Manufacturing Co., 1 B.T.A. 1037 (1925) 13

Appeal of Cornelius Cotton Mills, 4 B.T.A. 255 (1926) 14

Appeal of Gress Manufacturing Company, 3 B.T.A. 977 (1926) 13

Appeal of Tel-Electric Co., 1 B.T.A. 434 (1925) 12, 13

Barry v. Commissioner, 1 B.T.A. 156 (1924) 12

Berkery v. Commissioner, 90 T.C. 259 (1988) 9

Bull v. United States, 295 U.S. 247, 251 (1935) 12

Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943) ..... *passim*

Commissioner v. McCoy, 484 U.S. 3, 7 (1987) 10

Eagle Dye Works, 1 B.T.A. 638 (1925) 13

Mueller v. Commissioner, 101 T.C. 551 (1993) 1

Mueller v. Commissioner, No. 97-1856, 1998 FED. App. 0258P (6th Cir. 1998) 1

Naftel v. Commissioner, 85 T.C. 527, 533 (1985) 8

United States v. Dalm, 494 U.S. 596, (1990) 4, 5, 15, ... 19

Woods v. Commissioner, 92 T.C. 776 (1989) 8, 9

Statutes

28 U.S.C. § 1254 1

I.R.C. § 2013 2

I.R.C. § 6213(a) 2

I.R.C. § 6214(b) ..... *passim*

I.R.C. § 6512(b) 1, 7, 9, 11

I.R.C. § 7482(a)(1) 2

I.R.C. § 7442 8

I.R.C. (1939) § 272(g) 7

§ 274(g) Revenue Act of 1926 17

All Section references are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated. The Internal Revenue Code is contained in Title 26 of the United States Code.

Other Authorities

H. Rept. 1, 69th Cong., 1st Sess. 11, (1925) 1939-1 C.B. Part 315, 322 12

Steven J. Willis, *Equitiable Recoupment: More Pitfalls For The Unwary*, Vol. 81 No. 3 Tax Notes Today 361 (October 19, 1998); available on LEXIS Doc. 98-31014, TNT 201-108 4

I. Citation to Opinions and Orders

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Mueller v. Commissioner*, No. 97-1856, 1998 FED. App. 0258P (6th Cir. 1998), and is included in App. to Pet. for Cert. 3a.

The Tax Court Opinion is reported at *Mueller v. Commissioner*, 101 T.C. 551 (1993), and is included in App. to Pet. for Cert. 13a.

II. Basis for Supreme Court Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 20, 1998. App. to Pet for Cert. 1a

This Court has jurisdiction to review the judgment in question on a writ of certiorari pursuant to 28 U.S.C. § 1254.

III. United States Statutes Involved in the Case

This case involves I.R.C. § 6214(b) and § 6512(b) which are set forth in App. to Pet for Cert. 44a and 46a respectively.

IV. Statement of the Case

Petitioners are representatives of an estate of a decedent who owned certain shares of stock at the time of death in March, 1986. Shortly following death the shares were sold and a capital gains tax was paid on the sale. The tax was determined by using as cost basis the value of the shares

reported by the estate in its Federal estate tax return of $1,505 per share. Upon subsequent audit of the estate tax return by the Internal Revenue Service a deficiency was assessed based primarily upon an increase in the taxable value of the shares to $2,150 per share. Petitioners timely filed a petition in the Tax Court for redetermination of the estate tax deficiency under I.R.C. § 6213(a). In 1993 the deficiency was adjudicated in the Tax Court which held that the taxable value of the shares should be partially increased to $1,700 per share. This increase in taxable value also increased the cost basis of the shares for capital gains tax purposes on the prior sale and resulted in an overpayment of such taxes having been made. By the time of the Tax Court's determination, recovery of the resulting overpayment had become time-barred. In the Tax Court proceedings Petitioners had raised the affirmative defense of equitable recoupment arising out of the Commissioner's collection of an inconsistent capital gains tax based upon a value (and tax basis) of only $1,505 per share in the event the Court should find an increase in taxable value of the shares beyond this amount. The Tax Court held that it had jurisdiction to consider the defense, but denied its application on the facts of the case because of other unrelated adjustments in the deficiency. Petitioners appealed this decision to the Sixth Circuit Court of Appeals under I.R.C. § 7482(a)(1). The Court of Appeals reversed the Tax Court's holding that it had jurisdiction to consider a defense of equitable recoupment and on this ground Petitioners' appeal was denied. The Court of Appeals did not review the Tax Court's decision concerning the application of equitable recoupment in relation to the other unrelated adjustments in the deficiency.[1]

[1] The unrelated adjustments consisted primarily of a credit for estate tax paid on prior transfers under I.R.C. § 2013, which inadvertently had not been claimed on the estate tax return but was allowed upon audit by the Commissioner in determining the deficiency. App. to Pet. for Cert. 4a

V. Arguments in Support of Petition

A. Significance of Case to Administration of Tax Laws

1. Case involves whether decisions by lower courts during the past fifty years denying Tax Court jurisdiction over equitable recoupment defense claims are correct.

This case involves an issue of substantial importance in the administration of the tax laws of the United States. For fifty years the Tax Court of the United States has been denied jurisdiction to consider cases involving an affirmative defense of equitable recoupment. This denial has rested upon erroneous lower courts' interpretation of dicta in the Supreme Court's decision in *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943). Taxpayers seeking to use the prepayment jurisdiction of the Tax Court to contest a deficiency have had to forfeit any recoupment defense they might have for want of jurisdiction. This has unnecessarily burdened the administration of the tax laws and in many instances has prejudiced the rights of taxpayers who were economically compelled to contest their case in the Tax Court prior to payment of the tax rather than by refund suit. This result is wrong as a matter of tax policy, and it is wrong in its reliance upon the *Gooch Milling* decision, but it has nevertheless continued for fifty years. This issue should therefore be reviewed and corrected.

2. Case involves issue reserved for consideration by Supreme Court Justices in 1990.

Following the Supreme Court decision in *Gooch Milling*, the only other case considering the issue of equitable recoupment jurisdiction was *United States v. Dalm*, 494 U.S. 596, (1990). In *Dalm*, both the majority and dissenting Justices indicated concern with the assumed absence of Tax Court jurisdiction in equitable recoupment cases under the prevailing interpretation of *Gooch Milling*.[2] However, the *Dalm* case did not directly involve an appeal from the denial of Tax Court jurisdiction and therefore the Supreme Court did not have an opportunity to review the issue and clarify its position. *Mueller* presents this opportunity for the first time since the Court's decision in the *Dalm* case. If review of this issue is denied upon Petition for Certiorari, courts below will view the denial as confirming an absence of Tax Court jurisdiction in equitable recoupment cases, a result which the Justices in the *Dalm* case were so careful to avoid.

3. Case involves conflict in rationale between only two Supreme Court rulings on equitable recoupment jurisdiction.

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[2] In footnote 8 in the majority opinion of *Dalm*, 494 U.S. at 611; the Court noted that the taxpayer had failed to raise her recoupment defense before the Tax Court and then stated:

> "We have no occasion to pass upon the question whether *Dalm* could have raised a recoupment claim in the Tax Court."

See also, footnote 3 of the dissenting opinion in *Dalm*, 494 U.S. at 615; which commended the majority for specifically reserving the issue of Tax Court jurisdiction over recoupment claims and added that while the case of *Gooch Milling*, 320 U.S. at 418, appears to hold that there is an absence of such jurisdiction, a more careful reading indicates that the case involved only the narrower holding that a reduction of a deficiency in the amount of a tax overpayment for a separate tax year could not be considered by the Tax Court.

The decision of the Court of Appeals below relies on the interpretation of the *Gooch Milling* case which has prevailed for fifty years. This holding directly conflicts with the more recent decision of the Supreme Court in the *Dalm* case. In *Dalm* the Court held that an equitable recoupment defense cannot be the sole basis of a tax refund suit *because it does not constitute a jurisdictionally separate tax claim from the main action claim*. The Court of Appeals below denied Tax Court jurisdiction for the reason that under Gooch Milling an equitable recoupment defense *is a jurisdictionally separate tax claim for a year different from the main action deficiency*, and the Tax Court is prohibited by statute from considering separate year claims in redetermining a deficiency[3]. The Court of Appeals below refused to follow the rationale in the *Dalm* case for the reason that the case on its face did not directly involve the issue of Tax Court jurisdiction. App. to Pet. for Cert. 12a. This has left significant conflict and uncertainty over the availability of Tax Court jurisdiction in equitable recoupment cases.

4. Case raises important jurisdictional issue which is not frequently presented for review .

Finally, if the present case is not accepted for review the erroneous denial of Tax Court jurisdiction over equitable recoupment claims which has prevailed for the past fifty years will likely continue for many additional years. To present this issue on appeal a taxpayer with an available equitable recoupment defense must risk its forfeiture by selecting the Tax Court as the forum to contest a main action deficiency claim. Few taxpayers will be willing to do this. They will instead choose to contest the main action and recoupment defense

[3] The Tax Court has no jurisdiction over a tax claim for a separate tax year other than the deficiency year by reason of the provisions of I.R.C. § 6214(b).

by refund suit following payment of the deficiency. Taxpayers without the financial resources to do this will litigate deficiency claims against them in the Tax Court and accept forfeiture of any recoupment defense they might have as evidenced by the absence of appeals from the consistent denial of Tax Court recoupment jurisdiction over the past fifty years. The fair and equal administration of the tax laws to every taxpayer requires that the Supreme Court resolve the issue in this case so that an erroneous denial of Tax Court jurisdiction which has continued for too long may be ended.[4]

For these reasons this case should be reviewed by the Supreme Court of the United States.

B. Decision of Court of Appeals Below Denying Jurisdiction of Tax Court to Consider Affirmative Defense of Equitable Recoupment

In the present case it is not disputed that the Tax Court assumed proper jurisdiction of the main action tax claim against which the recoupment defense was raised. This satisfied the basic jurisdictional requirement for consideration of an affirmative defense of recoupment established by the Supreme Court in the *Dalm* case: timely jurisdiction over the main action claim. The Court of Appeals nevertheless denied the Tax Court authority to consider the defense because of what it believed to be additional limitations on the Tax Court's jurisdiction. These limitations were held to be as follows:

[4] Steven J. Willis professor of law at the University of Florida College of Law discusses the prevailing uncertainty regarding the availability of equitable recoupment in the Tax Court and expresses need for the Supreme Court to grant certiorari in the present case. Steven J. Willis, *Equitiable Recoupment: More Pitfalls For The Unwary*, Vol. 81 No. 3 TAX NOTES TODAY 361 (October 19, 1998); available on LEXIS Doc. 98-31014, TNT 201-108.

1) The Tax Court was created as a statutory court of limited powers and therefore cannot consider an equitable defense such as recoupment.

2) Under I.R.C. § 6214(b) and § 6512(b) the Tax Court may not consider a defense of equitable recoupment because it involves a prohibited exercise of jurisdiction to determine whether or not a tax was overpaid for a separate tax year.

3) The case of *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943), has interpreted I.R.C. § 6214(b)[5] to deny the exercise of jurisdiction by the Tax Court to consider the defense of equitable recoupment.

C. Tax Court as a Statutory Court Without Authority to Consider Equitable Claims

Contrary to the Court of Appeals' conclusion that the Tax Court cannot exercise equitable powers within its jurisdiction to redetermine a deficiency, the cases are legion that such authority exists and is routinely exercised. Judge Beghe's opinion in the Tax Court below fully addressed the issue of the Court's ability to exercise equitable powers in redetermining a deficiency as follows:

> "Respondent argues that we lack jurisdiction to apply the doctrine of equitable recoupment because there is no provision in the Internal

[5] The case involved the predecessor provision to Code §6214(b) which was §272(g) of the 1939 Code. The relevant language of both provisions is the same.

Revenue Code granting us authority to do so. As respondent points out, the Tax Court is a court of limited jurisdiction that derives its authority from the I.R.C.. § 7442. However, exercising jurisdiction over petitioner's recoupment defense does not require us to exercise jurisdiction that is beyond the scope of petitioner's main claim for the redetermination of its estate tax deficiency.

* * *

When a taxpayer raises an affirmative defense to a deficiency determination, we need no additional source of jurisdiction to render a decision with respect to the defense. It is part of the entire action over which we have jurisdiction. As we said in *Naftel v. Commissioner*, 85 T.C. 527, 533 (1985), when a taxpayer petitions this Court for a redetermination of a deficiency, we take jurisdiction over the entire tax liability, not just the items determined to be erroneous by the Commissioner in the notice of deficiency. This is a proceeding to redetermine petitioner's estate tax deficiency, over which we clearly have jurisdiction. Therefore, in deciding this case, we may take into account all facts that bear on petitioner's deficiency and may apply equitable principles in so doing. *Woods v. Commissioner*, [92 T.C. 776 (1989)] supra at 784-787.

In *Woods v. Commissioner*, supra at 784, we listed 'numerous instances where we have applied equitable principles in deciding issues over which we had jurisdiction.' These include the equity-based principles of waiver, duty of consistency (quasi-estoppel), estoppel, substantial compliance, abuse of discretion, laches, and the tax benefit

> rule. In *Woods v. Commissioner*, supra at 789, we reformed an agreement to extend the statutory period of limitations on assessment by reason of the parties' mutual mistake in executing a Form 872-A. Thus, in a Tax Court proceeding, either party is free to raise equity-based defenses to the assertions of the other party, including equitable recoupment, and the Court, insofar as it has jurisdiction over the main claim, is free to entertain those defenses. 'While we cannot expand our main jurisdiction through equitable principles, we can apply equitable principles in the disposition of cases that come within our jurisdiction. Id. at 784-785 (quoting *Berkery v. Commissioner*, 90 T.C. 259, 270 (1988) (Hamblen, J., concurring)).'"[6] (footnotes omitted)

These authorities conclusively support the authority of the Tax Court to exercise equitable powers within the scope of its deficiency and overpayment jurisdictions.

The issue is not whether the Tax Court can exercise equitable powers within the scope of its jurisdiction. This has been long settled. The issue is whether the affirmative defense of equitable recoupment involves only an exercise of equitable powers within the scope of the Court's jurisdiction to redetermine a deficiency or whether it involves an exercise of jurisdiction over a tax claim for a separate tax year which the Court may not consider[7]

[6] App. to Pet. for Cert. 20a-22a.

[7] The statutory limitation against Tax Court jurisdiction over "other year" tax claims in deficiency suits is contained in Code §§ 6214(b) and 6512(b). See discussion infra at p. 11-16.

The Court of Appeals below erroneously relied upon the holding in *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987). App. to Pet. for Cert. 6a. In this case the Supreme Court stated that the Tax Court does not have general equitable powers which it may exercise to waive penalties and interest on a deficiency. It was cited for the proposition that the Tax Court is a court of limited jurisdiction and does not have general equitable powers. The present case, however, does not involved any claim by the Tax Court to exercise general equitable powers outside its deficiency jurisdiction. The items of penalty and interest in the *McCoy* case had been separately assessed after the deficiency was redetermined by the Tax Court and thus had nothing to do with the liability claimed in the deficiency. Any such items would be clearly beyond the Tax Court's jurisdiction which extended only to the amount in the deficiency claim before it. In the present case the Tax Court's consideration of the defense of recoupment was for the very purpose of determining the amount of liability for the deficiency before it. The Court was acting within the scope of its statutory deficiency jurisdiction in considering an equitable defense and not exercising general equitable powers outside it. In the present situation the only issue is whether the defense of recoupment involves a statutorily prohibited exercise of jurisdiction over a separate tax claim arising in a time-barred tax year different from the deficiency.

D. Statutory Limitation Under Code § 6214(b)[8] as Reason for Denial of Tax Court Equitable Recoupment Jurisdiction

Section 6214(b) provides as follows:

> "JURISDICTION OVER OTHER YEARS AND QUARTERS.---The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, *but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.* [emphasis added]"

The Court of Appeals below concluded that I.R.C. § 6214(b) prohibits the Tax Court from considering an

[8] In support of its conclusion the Court of Appeals below also relied upon the provisions of I.R.C. § 6512(b) which grants overpayment jurisdiction to the Tax Court. App. to Pet. for Cert. 8a-9a. This provision allows the Court to determine overpayments of income tax "for the same taxable year," of gift tax "for the same calendar year or calendar quarter," and of estate tax "in respect of the taxable estate of the same decedent." The effect of this provision on the issue of recoupment jurisdiction is the same as under I.R.C. § 6214(b): whether the defense of recoupment involves only the Tax Court's exercise of its main action jurisdiction over the decedent's estate tax liability or whether recoupment is outside this jurisdiction because the defense involves a tax year or period separate from that of the estate tax deficiency. Section 6512(b) was viewed by the Court of Appeals below as merely confirming its conclusion of an absence of jurisdiction under the more specific limitation in I.R.C. § 6214(b) App. to Pet. for Cert. 8a-9a. The legal issues and analysis applicable to I.R.C. § 6214(b) are equally applicable to I.R.C. § 6512(b) and the latter provision, therefore, is not separately discussed.

equitable defense based on recoupment. It reasoned that the defense necessarily involves an exercise of jurisdiction over another tax year to determine whether or not a tax had been "overpaid" for such other year, and this is expressly prohibited. This denial of Tax Court jurisdiction is erroneous because the prohibition of I.R.C. § 6214(b) against determining whether taxes have been overpaid for a separate tax year was not intended, and does not operate, to prevent consideration of an affirmative defense of recoupment in the Tax Court.

1. Purpose of statute was not to deny Tax Court equitable recoupment jurisdiction.

The intended purpose of I.R.C. § 6214(b) was not to deny equitable recoupment jurisdiction to the Tax Court.[9] The provision originated in the Revenue Act of 1926. This was well before the very first application of equitable recoupment in tax cases in the Supreme Court decision in *Bull v. United States*, 295 U.S. 247, 251 (1935). This indicates that the immediate purpose of I.R.C. § 6214(b) was not to deny consideration by the Tax Court of the affirmative defense of recoupment claims since the defense was not then even known to be available in Federal tax cases. The provision was rather directed at an early Tax Court practice of considering overpayment claims for other *open tax years* as a credit, reduction, or setoff to a deficiency. These setoff claims involved none of the attributes of an equitable recoupment defense. The claims were not required to arise out of the same transaction as the main action deficiency[10], nor rest on

[9] The predecessor provision was I.R.C. § 274(g) of the Revenue Act of 1926. *See*, H. Rept. 1, 69th Cong., 1st Sess. 11, (1925) 1939-1 C.B. Part 315, 322. As the Tax Court noted in its opinion noted, the phrase "equitable recoupment" was not mentioned in the legislative history nor in the case of *Barry v. Commissioner*, 1 B.T.A. 156 (1924) which prompted the enactment of the provision. App. to Pet. for Cert. 24a-25a .

[10] See *Barry v. Commissioner*, 1 B.T.A. 156 (1924); *Appeal of Tel-Electric*

an inconsistent collection of double tax on the same property, nor involve a time-barred tax year, all of which must be present for an equitable recoupment defense under the *Bull* case. Consideration of setoff claims when redetermining a deficiency was in essence a joinder in a deficiency case of general unrelated tax overpayment claims for other separate and open tax years. These claims would otherwise have had to be pursued by way of taxpayer refund suit. In the adjudication of these claims the Tax Court necessarily assumed jurisdiction to determine whether taxes had been overpaid in a separate tax year. The exercise of this jurisdiction rested on the theory that the Tax Court's deficiency jurisdiction allowed it to consider a "net deficiency" resulting from all open years[11] which had been audited by the Commissioner.[12]

It was recognized, however, that unrelated setoff claims involved taxes which had already been paid. No deficiency had been asserted by the Government for the separate year of the alleged overpayment. This type of tax claim involving an open year could be contested by taxpayer refund suit with no hardship of additional tax payment. The rationale for Tax Court jurisdiction was to provide a special forum to contest claims for additional tax liabilities prior to payment. Claims of overpaid tax in other tax years did not fall within this rationale. Accordingly, in I.R.C. § 6214(b) jurisdiction over separate year claims of tax overpayment was denied to the Tax Court by Congress. The provision directed that in redetermining a deficiency the Court has no authority "to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid." The result was that

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Co., 1 B.T.A. 434 (1925); *Appeal of Banna Manufacturing Co.*, 1 B.T.A. 1037 (1925).

[11]See *Eagle Dye Works*, 1 B.T.A. 638 (1925).

[12]See *Appeal of Gress Manufacturing Company*, 3 B.T.A. 977 (1926).

overpayment claims for each separate tax year constituted a separate tax claim.[13] These had to be pursued only by refund suit and not by credit, reduction, or setoff in the Tax Court against a deficiency arising in a different tax year. None of these considerations applied to the issue of Tax Court consideration of a defense of equitable recoupment seeking to diminish a deficiency by reason of an inconsistent tax collected by the Government which was time-barred from recovery.

2. Language of statute does not cover equitable recoupment.

The language of I.R.C. § 6214(b) does not expressly deny equitable recoupment jurisdiction to the Tax Court. The denial occurs only if the affirmative defense of recoupment involves an exercise of jurisdiction determining that taxes for a separate year have been "overpaid or underpaid." An affirmative defense of equitable recoupment does not fall within this statutory prohibition. In adjudicating recoupment a court seeks to determine whether a single transaction is being twice taxed on inconsistent grounds in two separate years, one of which is time-barred. The court does not "reopen" the time-barred tax year nor make any adjudication of whether taxes for such year have been overpaid. Tax items for the closed tax year unrelated to the single transaction from which the recoupment defense arises are not considered. The result is that for the separate closed year involving a recoupment defense, no determination is ever made or even considered of whether taxes have been "overpaid or underpaid." The only inquiry in the consideration of a recoupment defense is whether a single transaction was included in the tax base of the closed year on an inconsistent ground from the deficiency claim. This inquiry is limited and significantly different from a determination that the taxes for the year were "overpaid or underpaid." The provisions of I.R.C. § 6214(b) apply only if a court exercises jurisdiction to

[13]See *Appeal of Cornelius Cotton Mills*, 4 B.T.A. 255 at 256 (1926).

determine whether taxes are "overpaid" for a separate tax year and this determination is never considered nor made when a court considers an equitable recoupment defense. The distinction is between a consideration of facts arising in a closed tax year and the determination of an actual overpayment of tax which can only be done for an open year. Congress limited the exercise of Tax Court jurisdiction under I.R.C. § 6214(b) only in situations where there is exercise of jurisdiction to determine an overpayment for a separate tax year. A recoupment defense does not involve this. The statute should not be stretched to include the defense of recoupment which falls neither within its intended purpose nor the operation of its terms.

3. Dalm case rationale excludes equitable recoupment from statute.

Finally, and perhaps most importantly, the Supreme Court decision in the *Dalm* case held that sovereign immunity and the statute of limitations operate in tax cases to impose a jurisdictional bar against any court, whether of limited or general jurisdiction, exercising authority to determine an overpayment for a time-barred tax year.[14] Under this holding an equitable recoupment defense can never involve an exercise of jurisdiction over a separate tax year because the recoupment year is always a time-barred year. If recoupment were a separate tax claim for a closed year, a Federal District Court could not consider the defense when it assumes jurisdiction over a main action refund claim because it would still be barred from exercising jurisdiction over a closed year. Any court's consideration of equitable recoupment exists under *Dalm* only as part of its jurisdiction over the main action claim and never as a separate tax claim. A main action claim

[14]See, *Dalm*, 494 U.S. at 608. The case is discussed infra at pp. 19-20

might be contested either in a refund suit after payment of the tax or as a deficiency in the Tax Court. A recoupment defense in the Tax Court does not change in character from what it is when raised in a refund suit. Recoupment in the Tax Court is still only a defense to the main action and not a separate tax claim for a time-barred tax year.

Accordingly, for I.R.C. § 6214(b) to bar recoupment claims after the *Dalm* case requires an erroneous conclusion that recoupment is a jurisdictionally separate tax claim for a time-barred year. It also requires that the statute be read as a meaningless and redundant prohibition against consideration of such claim which is already barred by principles of sovereign immunity and the statute of limitations. Clearly, the statute means only to bar jurisdiction over tax claims which the Tax Court might otherwise consider. These claims involve separate, *open*, tax years and not a main action defense based on equitable recoupment.

E. The Gooch Milling Case

In the case of *Gooch Milling*, 320 U.S. at 418 (1943), it was determined upon audit that the taxpayer had erroneously overvalued its inventory for the tax year 1935. This resulted in an overpayment for 1935 and, because the erroneous overvaluation was also used as opening inventory the following year, a deficiency for 1936. A petition for review of the 1936 deficiency based on the disputed inventory valuation was filed with the Board of Tax Appeals. By amended petition after limitations barred recovery of the 1935 overpayment, the taxpayer sought to setoff the overpayment against the 1936 tax deficiency. The Board held that it lacked jurisdiction to grant such relief because of the prohibition against determining a tax overpayment for a separate tax year under § 272(g) of the Internal Revenue Code of 1939, the

predecessor provision to § 6214(b) of the 1986 Code. On appeal to the Supreme Court the holding of the Board was affirmed.

1. Ambiguity in application to equitable recoupment claims.

There was ambiguity, however, in the Court's opinion regarding its application to a true equitable recoupment defense as opposed to a claim of setoff of a prior year's overpayment. The Supreme Court in *Gooch Milling* described the case as a taxpayer claim "to have the 1935 overpayment applied as an offset or recoupment against the 1936 deficiency." The opinion contained no discussion of the separate factors of an equitable recoupment defense as opposed to a claim of credit, reduction, or setoff of a prior year's tax overpayment. The Court concluded that the taxpayer's claim "necessarily involved a determination of whether there was an overpayment during the 1935 fiscal year."[15] Because of this ambiguity in the Supreme Court decision regarding its application to true equitable recoupment claims[16], the Tax

[15]*Gooch Milling*, 320 U.S. at 421.

[16]See *Gooch Milling*, 320 U.S. at 421. Ambiguity arises because the Court in *Gooch Milling* did not distinguish between equitable recoupment and setoff and used the terms interchangeably. Factors such as a time-barred tax, which is essential to recoupment but unavailable for setoff, appeared to be treated as not relevant to either claim. This statement strongly suggests that the Court in *Gooch Milling* was speaking only with regard to a claim of credit, reduction, or setoff of a prior year overpayment which had been raised by the taxpayer, and not to the concept of an equitable recoupment defense which may not have been specifically raised in the case. This is also true with regard to the Court's statement in *Gooch Milling*, 320 U.S. at 421, that the taxpayer's claim "necessarily involved a determination of whether there was an overpayment during the 1935 tax year." This statement is accurate with regard to claims of credit, reduction or setoff against a deficiency, but not with respect to an equitable re-

Court below treated the case as only denying Board jurisdiction to consider an overpayment "setoff" claim. App. to Pet. for Cert. 25a-26a. The Tax Court's analysis was consistent with the views expressed by Justices Stevens, Brennan and Marshall in the minority opinion in the *Dalm* case and not inconsistent with the majority opinion which made clear that it was not confirming an absence of Tax Court jurisdiction over recoupment claims by its decision in that case.[17] The Court of Appeals below rejected this as an erroneous interpretation and held that the *Gooch Mi ing* case barred consideration of the affirmative defense of equitable recoupment.

2. *Dalm* case rationale mutually inconsistent with *Gooch Milling*

Even if this ambiguity were disregarded the decision in *Gooch Milling* does not bar consideration of recoupment in the present case because the decision has been superceded by the Supreme Court's ruling in the *Dalm* case. *Gooch Milling* treated the affirmative defense of recoupment as an exercise of jurisdiction over a separate tax year. This analysis rested upon the view that a deficiency in one year and a recoupment defense based on an inconsistent tax paid in another year were two separate tax claims involving an exercise of jurisdiction over two separate years.

For approximately fifty years following the *Gooch Milling* case the Tax Court consistently held that it had no jurisdiction to consider equitable recoupment claims.[18]

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coupment defense which seeks merely to diminish the deficiency claim on equitable grounds rather than by reason of a determined overpayment of tax in the time-barred year.

[17] *See*, note 2, supra.

[18] *See generally*, App. to Pet. for Cert. 16a, where the cases are collected in

Taxpayers with an affirmative defense of equitable recoupment had two choices: (i) the main action deficiency claim could be contested without prepayment in the Tax Court but any recoupment defense would be forfeited since the Court lacked jurisdiction to consider it, or (ii) a taxpayer with resources sufficient to pay the tax could bring a refund suit covering both the main action claim and the recoupment defense.

In *Dalm*, 494 U.S. at 596 (1990), a taxpayer unsuccessfully sought to contest a main action tax deficiency claim in the Tax Court and thereafter bring a separate refund suit based solely on recoupment to recover an inconsistent time-barred tax. In this case the taxpayer received payments in 1976 and 1977 which she treated as a gift and gift taxes were paid. Thereafter the Commissioner determined that the payments were actually taxable fee income for services rendered for administering an estate. Income tax deficiencies for 1976 and 1977 were assessed. The taxpayer petitioned the Tax Court for redetermination and eventually settled the case with payment of income tax upon both deficiencies. The taxpayer raised no equitable recoupment claim in the Tax Court based on the prior payment of gift taxes which had become time-barred from recovery. Following settlement of the income tax claims the taxpayer brought a refund suit to recover the gift taxes based solely upon the defense of equitable recoupment. The District Court in the refund suit held it had no jurisdiction to consider a separate suit based on recoupment since it was only a defense to a main action claim over which it had no jurisdiction. The Sixth Circuit Court of Appeals reversed on the ground that a suit based on equitable recoupment could be maintained as an independent action apart from the main action claim.

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the Tax Court opinion below.

On appeal to the Supreme Court the decision was reversed on the ground that the affirmative defense of equitable recoupment does not provide jurisdiction for an independent action apart from the main action tax claim. A court must have jurisdiction over the main action claim to consider as a part of that claim an affirmative defense of equitable recoupment.

The decision in the *Dalm* case held that an affirmative defense of equitable recoupment based on a twice taxed "single transaction" did not constitute an "independent action" for recovery of taxes.[19] This rationale and holding directly affects the Tax Court's jurisdictional ability to consider recoupment claims. The Supreme Court's treatment of equitable recoupment as only an affirmative defense to the main action and not a jurisdictionally separate tax claim for another tax year was squarely at odds with the "separate claim, separate tax year" analysis of recoupment in the *Gooch Milling* case. In rejecting the existence of jurisdictionally independent recoupment claims, the Court in *Dalm* rejected the analysis upon which *Gooch Milling* rested.

The impact of the *Dalm* decision upon the Tax Court's jurisdiction to hear an equitable recoupment claim is clear and unmistakable. *Since equitable recoupment is only an affirmative defense to the main action and not a jurisdictionally separate tax claim, its consideration by the Tax Court does not violate the provisions of I.R.C. § 6214(b).* This provision only prohibits consideration by the Tax Court of separate tax claims beyond the deficiency year. Consideration of an affirmative defense to the deficiency which is not a jurisdictionally separate claim does not extend the Court's jurisdiction beyond the main action deficiency claim.

[19]*Dalm*, 494 U.S. at 610-611.

The error of the Government and the Court of Appeals lies in failing to understand the rationale of the *Dalm* case and its effect upon *Gooch Milling*. The Court of Appeals' decision rests upon an uncritical analysis. It reasoned that the *Dalm* case did not change the historical absence of Tax Court jurisdiction over equitable recoupment under *Gooch Milling* because the issue was not directly involved.[20] However, this is only a superficial understanding of the case which does not consider its rationale. A more complete understanding of *Dalm* confirms that it rests on the treatment of the main action claim and recoupment defense as one single tax claim involving the exercise of jurisdiction for only a single tax year---the main action tax year. Accordingly, under the interpretation of equitable recoupment in *Dalm*, when the Tax Court takes jurisdiction of a main action deficiency claim and recoupment defense, it does not exercise prohibited jurisdiction over a claim for a separate tax year. It only adjudicates whether the deficiency before it should be diminished by reason of equitable considerations and facts occurring in a separate tax year.

The "single claim, single tax year" analysis of main action and recoupment in *Dalm* supercedes the "two claims, separate tax years" analysis of main action and recoupment in *Gooch Milling*. And for this reason the Tax Court may hear a defense of equitable recoupment.

[20]*See*, App. to Pet. for Cert. 12a.

VI. Conclusion

For the reasons set forth above, the issue of the Tax Court's jurisdiction to consider an affirmative defense of equitable recoupment raised by this case has already been answered by the Supreme Court's decision in the *Dalm* case. A court, such as the Tax Court, which has assumed timely jurisdiction over the main action claim may *in the exercise of that jurisdiction* consider an affirmative defense of equitable recoupment. The provisions of § 6214(b) do not prohibit this because only deficiency jurisdiction, and not additional jurisdiction over a separate tax year, is being exercised in the consideration of a defense of equitable recoupment.

Because of the importance of a resolution of the issue raised by this case to the administration of the tax laws of the United States, and because compelling arguments exist that the decision of the Court of Appeals below is erroneous, the Supreme Court should grant a writ of certiorari and review this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-1856

ESTATE OF BESSE I. MUELLER, DECEASED,
JOHN S. MUELLER, Personal Representative,
Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent - Appellee.

Before: KEITH, BATCHELDER, and DAUGHTREY, Circuit Judges

JUDGMENT

ON APPEAL from a decision of the United States Tax Court.

THIS CAUSE was heard on the transcript of record from the Tax Court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that this court AFFIRMS the dismissal of the taxpayer's claim for equitable recoupment on the grounds that the Tax Court lacked jurisdiction to effect such a remedy.

ENTERED BY ORDER OF THE COURT

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
ELECTRONIC CITATION: 1998 FED App. 0258P (6th Cir.)
File Name: 98aO258p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ESTATE OF BESSE I. MUELLER, DECEASED; JOHN S. MUELLER, Personal Representative,
Petitioners-Appellants,

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

97-1856

Appeal from the United States Tax Court.
No. 2733-90.
Argued: June 11, 1998
Decided and Filed: August 20, 1998

Before: KEITH, BATCHELDER, and DAUGHTREY, Circuit Judges.

Mueller, et. al. v. Commissioner No. 97-1856

COUNSEL

ARGUED: Stevan Uzelac, MILLER, CANFELD, PADDOCK & STONE, Detroit,.Michigan, for Appellants. Charles Bricken, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION, TAX DIVISION, Washington, D.C., for Appellee. ON BRIEF: Stevan Uzelac, Michael A. Indenbaum, MILLER, CANFIELD, PADDOCK & STONE, Detroit, Michigan, for Appellants. Charles Bricken, Jonathan S. Cohen, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION, TAX DIVISION, Washington, D.C., for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge: This is a case in which a taxpayer and the Internal Revenue Service ("IRS") disagree over the effect of an audit adjustment to the taxpayer's estate tax return. Specifically at issue are 8,924 shares of stock that the taxpayer undervalued when it filed the estate tax return, as a result of which the taxpayer underreported the taxable value of the shares and, consequently, underpaid its estate taxes. In addition, the government's determination that the stock was worth more than taxpayer claimed also had the effect of creating an overpayment in capital gains tax paid by the taxpayer in a previous year on the stock's sale. Just as the higher stock valuation resulted in a higher taxable amount, it also resulted in a higher basis in the stock and, therefore, a

smaller amount of capital gains upon the sale of the stock. The problem for taxpayer is that the statute of limitations now bars any claim for a refund of the overpaid capital gains tax.

The question on appeal is whether the taxpayer is entitled to assert the defense of equitable recoupment in order to use the time-barred overpayment of capital gains taxes as a set-off against the timely charged deficiency in estate taxes. Before we can reach this question, however, we must first decide whether the Tax Court had the jurisdiction to apply the doctrine of equitable recoupment. Because we find that the Tax Court lacked jurisdiction to consider a claim for equitable recoupment, we affirm the dismissal of the taxpayer's suit without reaching the merits of the equitable recoupment claim.

I.

The appellant, Estate of Bessie I. Mueller,[1] filed its estate tax return and paid $5,523,953 which it had determined to be its tax liability. Upon subsequent audit, however, the IRS determined that appellant had made several errors. First, it discovered that appellant failed to claim a credit in the amount of $1,152,649 available to it for prior paid taxes under I.R.C. § 2013. Second, it found that the appellant claimed $6,000 more in unified credits than it was allowed. Finally, and most important to this case, the IRS determined that appellant had underreported the taxable value of 8,924 shares of Mueller Co. stock at $1,505 per share rather than at $2,150 per share. Based on

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[1] Actually, there are two petitioners in this appeal-the Estate of Bessie I. Mueller and John S. Mueller, its personal representative-but, for the purpose of clarity, we will refer to those parties as either the taxpayer or the appellant.

these and other smaller adjustments, the IRS determined that appellant owed an estate tax deficiency of $1,985,624.

Appellant filed a timely petition in Tax Court seeking a redetermination of its estate tax liability, but failed to file a protective claim for refund of its income tax that, according to the IRS's valuation of the stock, it had overpaid. The refund claim expired and appellant subsequently amended its petition to the Tax Court to assert the affirmative defense of equitable recoupment against the estate tax deficiency. Thus, appellant sought two forms of relief from the Tax Court: it sought to have the valuation of the stock redetermined and it sought to have the time-barred income tax refund set-off via equitable recoupment against the estate tax deficiency.

After a trial, the Tax Court found that the stock should have been valued at $1,700 per share, rather than $1,505 per share as appellant had claimed or $2,150 per share as the IRS had claimed. This new valuation resulted in an estate tax deficiency of $957,099, due to the underreported value of the stock, but the deficiency was offset by the estate's failure to claim the $1,152,649 credit for prior taxes paid. Thus, the Tax Court held that there was no deficiency at all, but rather that appellant had overpaid its estate taxes. This decision was the first of three rendered by the Tax Court, and we shall refer to it as Mueller I.

After *Mueller I*, the IRS moved to dismiss the estate's claim for equitable recoupment for lack of jurisdiction. A divided Tax Court denied the motion, ruling that it had jurisdiction to entertain the affirmative defense of equitable recoupment. This decision, which we call *Mueller II*, dealt only with the Tax Court's jurisdiction to consider the defense of equitable recoupment, and did not address the merits of the question. After further trial

proceedings, the Tax Court issued its decision in *Mueller III*, holding that equitable recoupment did not apply in the circumstances of this case.

II.

The dispute here is entirely a legal one, as neither party contests any issues of fact. We review the legal conclusions of the tax court de novo. *Estate of Swallen v. Commissioner of Internal Revenue*, 98 F.3d 919, 922 (6th Cir. 1996); *see* also *Wolpaw v. Commissioner of Internal Revenue*, 47 F.3d 787, 790 (6th Cir. 1995); *United States v. Hans*, 921 F.2d 81,. 82 (6th Cir. 1990). The taxpayer is appealing the Tax Court's *Mueller III* decision not to apply equitable recoupment and does not appeal the *Mueller II* decision to exercise jurisdiction over the equitable recoupment claim. Before we can reach the question decided in *Mueller III*, however, we must first determine whether the Tax Court was correct to hold, as it did in *Mueller II*, that it had the jurisdiction to consider such a claim. "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review. '" *Bender v. Williamsport Area Sch. Dist.*, 475 U.S: 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237,

The Tax Code specifies that "[t]he Tax Court and its divisions shall have such jurisdiction as is conferred on them by [Title 26]." 26 U.S.C. § 7442. In addition, the Supreme Court has held that "[t]he Tax Court is a court of *limited jurisdiction* and lacks general equitable powers." *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) (emphasis added). Insofar as is relevant to the present case, the Tax Court has jurisdiction to redetermine the correct amount of a deficiency." 26 U.S.C. § 6214(a).

A deficiency results when the IRS imposes a tax upon the taxpayer that is higher than that reported on the

taxpayer's tax return. The deficiency may result from an oversight or, as is the case here, it may result from a disagreement as to the amount owed. A taxpayer has two choices when he disagrees with an assessment of deficiency by the IRS: he may pay the tax and then sue in District Court for a refund, or he may refuse to pay the tax and submit his claim to the limited jurisdiction of the Tax Court for redetermination of the deficiency. If the taxpayer chooses the second course, he gains the benefit of not paying the tax until the issue is resolved, but he must pay the price of submitting his claim to a court of limited jurisdiction.

A deficiency redetermination sought in the Tax Court should not be confused with a refund suit filed in the district court. Whereas the deficiency redetermination is nothing more than the judicial review of an assessment made by an administrative agency, a refund suit is an "action brought to recover a tax erroneously paid, [which] although an action at law is equitable in its function. It is the lineal successor of the common count *indebitatus assumpsit* for money had and received." *Stone v. White*, 301 U.S. 532, 534 (1937). Thus, by refusing to pay the tax and filing for a redetermination in the Tax Court, the taxpayer sacrifices the opportunity to have his claim adjudicated by a court with the jurisdiction to effect justice both in law and in equity.

In order to determine the correct amount of the deficiency, the Tax Court may need to consider "facts with relation to taxes for other years or other calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, *but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.*" 26 U.S.C. § 6214(b) (emphasis added). Thus, § 6214(b) makes it abundantly

clear that the Tax Court's jurisdiction extends no further than the amount of the deficiency before it.

The Tax Court in *Mueller II* made much of the fact that estate taxes are not mentioned in § 6214(b)'s prohibition against determining whether taxes in other years have been overpaid or underpaid. The statute does not mention estate taxes, argued the Tax Court in *Mueller II*, so its limitations must not apply to estate taxes. It is true that the statute does not mention estate taxes. It is also true that § 6214(b) is titled "Jurisdiction over other years and quarters," a heading which can apply only to periodic taxes such as income or gift taxes. The estate tax is not a periodic tax. It accrues only at the death of the taxpayer, and although it may be a source of great sorrow to the IRS, the average taxpayer will die only once. Section 6214(b) does not specifically mention estate taxes because it makes no sense to speak of estate taxes for other years or other calendar quarters. The statute's failure to mention estate taxes does not support the theory that the Tax Court's jurisdiction is limited in income and gift tax cases, but unlimited in estate tax cases.

Section 6512(b) lends credence to this analysis. That section confers upon the Tax Court the jurisdiction to determine an overpayment if it is an overpayment: "[1] of income tax for the same taxable year, [2] of gift tax for the same calendar year or calendar quarter, [or 3] of estate tax in respect of the taxable estate of the same decedent." 26 U.S.C. § 6512(b) (emphasis added). Thus, the Tax Court has jurisdiction to determine an overpayment only if the overpayment concerns the same kind of tax and, as to income and gift taxes, only if it was paid in the same year. This makes sense because determining an overpayment of a particular kind of tax in a particular year is no different

from determining the accuracy of an assessment for that same tax.

Taken together, §§ 6214(b) and 6512(b) explicitly confer on the Tax Court jurisdiction to do no more than determine the amount of the deficiency before it. The Tax Court's jurisdiction cannot extend beyond its statutory confines to encompass an equitable remedy such as recoupment because the Tax Court "is a court of limited jurisdiction and lacks general equitable powers," *McCoy*, 484 U.S. at 7, and because "[t]he Tax Court and its divisions shall have such jurisdiction as is conferred on them by [Title 26]." 26 U.S.C. § 7442. This statutory analysis only confirms what federal courts have been holding for more than 50 years.

In *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 418 (1943), the Supreme Court faced the question of "the jurisdiction of the Board of Tax Appeals [the predecessor to the Tax Court] to determine and to apply a prior tax overpayment against a tax deficiency for a particular year." Like the present case, *Gooch Milling* involved an IRS audit that disclosed an erroneous valuation of certain of the taxpayer's property. The new valuation resulted in a deficiency in the taxpayer's income tax return for the 1936 fiscal year and a correlating overpayment of income taxes for the 1935 fiscal year. Also like the present case, the statute of limitations had already run to bar the taxpayer's claim for a refund of the overpaid 1935 taxes. After analyzing I.R.C. §§ 272 and 322(d), now codified as §§ 6214(b) and 6512(b), the Supreme Court held that "[t]he Board's want of jurisdiction to apply the doctrine of equitable recoupment in this case is manifest from these provisions." *Gooch Milling*, 320 U.S. at 420.

According to the *Gooch Milling* Court, the Tax Court did not need to look at the 1935 overpayment in

order to correctly determine the deficiency in 1936. "The respondent, in other words, was seeking to have the 1935 overpayment used, not as an aid in redetermining the 1936 deficiency, but as an affirmative defense or offset to that deficiency." *Id.* at 421. Such a defense, held the Court, would necessarily involve the Tax Court's determining whether there was an overpayment in 1935, a determination strictly prohibited by the plain language of § 272(g). *Id.* The reasoning in *Gooch Milling* is just as applicable to the determination of estate tax deficiencies as it is to determination of income tax deficiencies. In both situations, in order to apply equitable recoupment, the Tax Court would have to move beyond the scope of the deficiency at hand and determine an overpayment of a tax assessment not properly before it. As we explained above, §§ 6214(b) and 6512(b) (formerly §§ 272 and 322(d)) make it clear that such a determination exceeds the limits of the Tax Court's jurisdiction.

Since the *Gooch Milling* decision, federal courts, including the Tax Court itself, have repeatedly cited the case for the proposition that the Tax Court does not have the jurisdiction to consider the affirmative defense of equitable recoupment. See, e.g, Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 303 (1946) (citing *Gooch Milling* and holding unequivocally that "the Tax Court has no jurisdiction to consider recoupment"); *Mohawk Petroleum Co. v. Commissioner of Internal Revenue*, 148 F.2d 957, 959 (9th Cir. 1945) (affirming the Tax Court's refusal to apply equitable recoupment and noting that "[t]he Supreme Court . . . decided this question adversely to the contention of the appellant . . . holding that the Board of Tax Appeals was prevented by § 272(g) . . . from entertaining such a claim"); *Elbert v. Johnson*, 164 F.2d 421, 424 (2d Cir. 1947) ("[T]he Tax Court lacked

power to allow as a credit against the 1938 income tax, by way of recoupment, the gift tax paid in 1936."); *Weiner Machinery Co., Inc. v. Commissioner of Internal Revenue*, 16 T.C. 48, 54 (1951) (citing *Gooch Milling* for the proposition that "[this Court lacks the power to apply the doctrine of equitable recoupment"); *Estate of Van Winkle v. Commissioner of Infernal Revenue*, 51 T.C. 994, 999 (1969) ("The Supreme Court has already decided the question as to whether the Tax Court has jurisdiction to consider application of the doctrine of equitable recoupment. It specifically held that the remedy is available to taxpayers only in the United States District Courts."). Thus, the Tax Court in *Mueller II* rebelled against the overwhelming weight of statutory authority and prior case law.

As support for its sudden departure, the *Mueller II* Court cited the Supreme Court's decision in *United States v. Dalm* 494 U.S. 596 (1990). The taxpayer in *Dalm* had litigated an income tax deficiency in an earlier Tax Court proceeding in which she had not raised the issue of equitable recoupment. She then brought a subsequent claim in the District Court seeking, effectively, to reopen the matter and have a time-barred overpayment of gift taxes offset against her- income tax deficiency by means of equitable recoupment. The Supreme Court held that a claim of equitable recoupment cannot form an independent basis for jurisdiction, but can only be raised as a defense in a proceeding over which the court already has jurisdiction. 494 U.S. at 608 According to the Court:

> Our holding today does not leave taxpayers in Dalm's position powerless to invoke the doctrine of equitable recoupment. Both the Secretary, at the administrative level, and a court *which has jurisdiction* over a timely suit for refund may

> consider an equitable recoupment claim for an earlier tax paid under an inconsistent theory on the same transaction.

Id. at 610 (citations omitted) (emphasis added).

The *Dalm* Court did not reach the issue of whether the Tax Court is "a court which has jurisdiction," specifically noting that "[w]e have no occasion to pass upon the question whether Dalm could have raised a recoupment claim in the Tax Court." Id. at 611 n. 8. Despite the limited scope of the holding in *Dalm* and notwithstanding the Supreme Court's express admonition that its decision did not touch upon the jurisdiction of the Tax Court to apply the doctrine of equitable recoupment, the *Mueller II* Court relied on *Dalm* to support its departure from the long line of precedent we cited above. *Dalm* simply does not justify such a departure.

III.

The decision of the Tax Court to exercise jurisdiction in this case flies in the face of unambiguous statutory language as well as 50 years of Supreme Court precedent. For these reasons, we AFFIRM the dismissal of the taxpayer's claim for equitable recoupment on the grounds that the Tax Court lacked jurisdiction to effect such a remedy.

[CCH Dec. 49,461] ESTATE OF BESSIE I. MUELLER, DECEASED, JOHN S. MUELLER, PERSONAL REPRESENTATIVE V. COMMISSIONER.

Docket No. 2733~90. 101 TC –, No. 37. Filed December 13, 1993. [Appealable, barring stipulation to the contrary, to CA-2.—CCH.]

[Code Secs. 6214, 6511 and 6512]

[Estate, gift and generation-skipping transfer taxes: Returns and procedure: Affirmative defense: Equitable recoupment.] R moved to dismiss for lack of jurisdiction the partial affirmative defense of equitable recoupment asserted in P's amended petition. Held, without reaching the merits of P's equitable recoupment defense, the Tax Court is authorized to apply the doctrine of equitable recoupment, and R's motion to dismiss is denied. Secs. 6214(b) and 6sl2(b), I.R.C. 1954. held inapplicable, and *Commissioner v. Gooch Milling & Elevator Co.* [43-2 USTC 119673], 320 U.S. 418 (1943), distinguished. *Estate of Van Winkle v. Commissioner* [Dec. 29,5021, 51 T.C. 994 (1969), and other Tax Court cases denying the Tax Court's authority to apply equitable recoupment, will no longer be followed.

Stevan Uzelac, Michael A. Indenbaum, and Paul L. Winter, 150 W. Jefferson. Detroit. Mich., for the petitioner. Thomas M. Rath. for the respondent.

OPINION

BEGHE, Judge: *In Estate of Mueller v Commissioner* [Dec. 48,225(M)], T.C. Memo. 1992-284, we redetermined the increased value of the shares of Mueller Co. included in decedent's gross estate. We now consider respondent's

motion to dismiss for lack of jurisdiction the partial affirmative defense of equitable recoupment asserted in petitioner's amended petition in respect of a time-barred overpayment income tax by petitioner's residuary legatee, the Bessie I. Mueller Trust (the Trust). For the reasons discussed below, we deny respondent's motion to dismiss.

Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, and all Rule references are to the Tax Court Rules of Practice and Procedure.

The ancient doctrine of equitable recoupment, which developed concurrently at common law and in equity, was judicially created to preclude unjust enrichment of a party to a law suit and to avoid wasteful multiplicity of litigation. See generally McConnell, "The Doctrine of Recoupment in Federal Taxation", 28 Va. L. Rev. 577, 579-581 (1942). The doctrine has been applied in Federal tax matters since the Supreme Court's decision in *Bull v. United States* 295 U.S. 247 (1935), to allow the bar of the expired statutory limitation period to be overcome in limited circumstances in order to prevent inequitable windfalls to either taxpayers or the Government that would otherwise result from inconsistent tax treatment of a single transaction, item, or event affecting the same taxpayer or a sufficiently related taxpayer. See also *United States v. Dalm* [90-1 USTC ¶ 60,012] 494 U.S. 596, 6054506 n.5 (1990); *Rothensies v. Electric Storage Battery Co.* [47-1 USTC ¶ 9016], 329 U.S. 296 (1946); *Stone v. White* [37-2 USTC 9498], 301 U.S. 532 (1937). The doctrine of equitable recoupment may be applied to relieve inequities caused when a transaction is treated inconsistently under different taxes, such as the income tax and the estate tax. *Bull v. United States*, supra; *Boyle v. United States* [66-1 USTC ¶ 9225], 355 F 2d 233 (3d Cir. 1965). However the party

asserting equitable recoupment may not affirmatively collect the time-barred underpayment or overpayment of tax. Equitable recoupment "operates only to reduce a taxpayer's timely claim for a refund or to reduce the government's timely claim of deficiency".
O'Brien t. United States [85-2 USTC 11 94921, 766 F.2d 1038, 1049 f7th Cir 1985).

Respondent argues that we are precluded from applying the doctrine of equitable recoupment because there is no provision in the Internal Revenue Code tlıat grants the Tax Court jurisdiction to apply equitable recoupment, and that sections 6214(b)[1] and 6512(b),[2] and their statutory predecessors, as interpreted and applied by the Supreme Court in *Commissioner v. Gooch Milling & Elevator Co.* [43-2 USTC ¶ 9673], 320 U S. 418 (1943), expressly deny the Tax Court jurisdiction to apply equitable recoupment.

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[1] Sec. 6214(b) provides: (b) Jurisdiction Over Other Years and Quarters.-The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.

[2] Sec. 6512(b)(1) provides that if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tan in respect of the taxable estate of the same decedent, of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates for the same taxable period, in respect of which the Secretary determined the deficient, or finds that there is a deficiency but that the taxpayer has jurisdiction to determine the amount of such over payment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

We disagree with both of these arguments. The absence of an express statutory grant of jurisdiction does not bar us from considering the affirmative defense of equitable recoupment because, as an affirmative defense, it comes within our jurisdiction to redetermine petitioner's estate tax deficiency. Moreover, neither section 6214(b) or 6512(b) nor *Gooch Milling* denies us authority to apply equitable recoupment.

Respondent points out that we have consistently adhered to the view that we lack jurisdiction to apply equitable recoupment. See, e.g. *Estate of Schneider v. Commissioner* [Dec 46,143], 93 T.C. 568, 570 (1989); *Phillips Petroleum Co. v. Commissioner* [Dec. 45,667], 92 T.C. 885, 888-890 (1989), *Poinier v. Commissioner* [Dec. 42,957], 86 T.C. 478, 490-491 (1986), affd. in part and revd. in part [88-2 USTC ¶ 13,783] 898 F.2d 917 (3d Cir. 1988); *Estate of Van Winkle v. Commissioner* [Dec. 29,502], 51 T.C. 994, 999-1000 (1969); *Vandenberge v. Commissioner* [Dec. 13,749], 3 T.C. 321, 327-328 (1944), affd. [45-1 USTC ¶ 9171] 147 F2d 167 (5th Cir. 1945) However. in *United States v. Dalm*, supra, the Supreme Court adverted to the possibility that the Tax Court could have applied equitable recoupment, but stated that it had "no occasion to pass upon the question whether Dalm could have raised a recoupment claim in the Tax Court," *Id.* at 611 n.8, because she had not raised the issue in her Tax Court petition. We therefore reconsider the issue in light of Dalm.[3]

In *United States v. Dalm*, .supra, the taxpayer was administratrix of a decedent's estate and received fees for her services of $30,000 in 1976 and $7,000 in 1977. The

[3] See also *O'Brien v. United States* [85-2 USTC ¶ 9492], 766 F.2d 1038, n.15 (7th Cir.1985) (stating that "It is not clear whether the Tax Court currently possesses the equitable jurisdiction necessary to apply the equitable recoupment doctrine.").

decedent's sole heir also paid Mrs. Dalm $180,000 in 1976 and $133,813 in 1977, totaling one-third of the net estate, supposedly to carry out the decedent's intentions. The heir filed a Federal gift tax return for the calendar year 1976, and Mrs. Dalm paid the gift tax on that transfer. Neither the heir nor Mrs. Dalm paid gift tax on the 1977 transfer.

In 1983, after the statutory limitation period had expired on the 1976 gift tax, the IRS determined that the $180,000 and $133,813 transfers to Mrs. Dalm in 1976 and 1977 were additional fees that she should have reported as income on her Federal income tax returns for the taxable years 1976 and 1977, and determined deficiencies in her income taxes for those years. Mrs. Dalm petitioned the Tax Court for a redetermiation, arguing that the transfers were gifts excludable from gross income under section 102(a), rather than fees includable as income under section 61(a)(1). However, she did not raise in her Tax Court petition, as required by Rule 39, the affirmative defense of equitable recoupment.[4]

Two days after the trial of the income tax case in this Court, the parties settled. Mrs. Dalm agreed to pay reduced income tax deficiencies for the taxable years 1976 and 1977. Mrs. Dalm then filed an untimely administraive claim for refund of the 1976 gift tax, and thereafter brought suit in U.S. District Court after the IRS had failed to act on the claim within 6 months. The District Court granted

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[4] Rule 39 provides that

> A party shall set forth in the party s pleading any matter constituting an avoidance or affirmative defense, including res judicata, collateral estoppel, estoppel, waiver, duress fraud, and the statute of limitations. A mere denial in a responsive pleading will not be sufficient to raise any such issue.

See Gustafson v Comnrissioner [Dec. 47,492], 97 T.C. 85, 89-97. (1991) (if an affirmative defense is not pleaded, it is deemed waived).

summary judgment in favor of the Government and dismissed the case because the recoupment claim was time barred, stating that "no precedent has yet been discovered in which an independent lawsuit, such as this, has been maintained for a year in which the statute of limitations has run." *Dalm v. United States* 98-1 USTC ¶13,806 (D. Mich. 1987). The U.S. Court of Appeals for the Sixth Circuit reversed, holding that the prerequisites for applying equitable recoupment had been satisfied and that the equitable recoupment claim was not an independent lawsuit different from the case in the Tax Court. *Dalm v. United States,* [89-1 USTC ¶ 13.807, 89-1 USTC ¶ 9171], 867 F.2d 305 310 (6th Cir. 1989). The Supreme Court granted the Government's petition for a writ of certiorari. *United States v. Dalm,* 493 U S. 807 (1989).

In *Dalm* the factual requirements for equitable recouument appear to have been satisfied, a single transaction (the 1976 transfer from the heir to the administratrix) had been subject to double taxation (gift tax and income tax)'on the basis of inconsistent factual characterizations and legal theories (as both a gift and compensation). Cf. *Commissioner v. Duberstein,* 363 U.S 278 (1960). Nonetheless the Supreme Court reversed the Court of Appeals' decision on the ground that a claim for equitable recoupment of time-barred overpaid taxes could not by itself provide the jurisdictional basis for a fax refund suit in U.S. District Court. *United States v. Dalm* [90-1 USTC ¶ 60,012], 494 U.S. at 606 608. The Supreme Court stated that its past decisions in *Stone v White* [37-1 USTC ¶ 9303], 301 U.S. 532 (1937), and *Bull v. United States* [35-1 USTC 1t 9346],295 U.S. 247 (1935),

> stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and

> inconsistent, but m time-barred tax claim relating to the same transaction.* * * [*United States v Dalm* [90-1 USTC ¶ 60,012],494 U.S. at 608.]

Inasmuch as Mrs. Dalm was trying to use her recoupment claim offensively to support a separate time-barred claim for refund of overpaid gift tax, the Supreme Court reversed the Court of Appeals for the Sixth Circuit and reinstated the District Court's decision that it had no jurisdiction to adjudicate the taxpayer's equitable recoupment claim.

Dissenting *in United States v Dalm* [90-1 USTC ¶ 60,012], 494 U.S. at 612-623, Justice Stevens disagreed with the majority's decision on the District Court's jurisdiction to hear Mrs. Dalm's claim for refund based on equitable recoupment, but commended the majority's reservation of the question whether the Tax Court has authority to consider recoupment. Id at 615 n. 3.[5]

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[5] Justice Stevens noted that the parties had not disputed whether the Tax Court had authority to consider recoupment of the gift tax against the income tax, and, in the footnote, said:

> See Rev. Rul. 71-56, 1971-1 Cum Bull. 404, 405 ("[The Tax Court lacks jurisdiction to consider a plea of equitable recoupment"); see also *Estate of Schneider v. Commissioner* [Dec. 46,143] 93 T.C. 568 (1989). In *Rothensies v Electric Storage Battery Co.* [47-1 USTC ¶ 9106], 329 U.S. 296, 303 (1946), we cited *Commissioner v. Gooch Milling Elevator Co.* [43-2 USTC ¶ 19673],32O U.S. 418 (1943) for the, proposition tha: the Tax Court has no jurisdiction to consider recoupment. A careful reading of the *Gooch Milling* opinion, and of the relevant statute, however, will show that it actually considered only the question of recoupment based on an overpayment in the year other than the year in dispute. I therefore commend the Court for its careful reservation of the issue, see *ante* at 611, n.8. It is nevertheless appropriate to assume for purpose d deciding the jurisdictional issue in this case that respondents counsel correctly believed that no recoupment could be had in the Tax Court.
>
> Of course, if this Court were eventually to decide the reserved issue by holding that the Tax Court has jurisdiction to hear an equitable recoupment claim. (today's decision would become a dead

Respondent argues that we lack jurisdiction to apply the doctrine of equitable recoupment because there is no provision in the Internal Revenue Code granting us authority to do so. As respondent points out, the Tax Court is a court of limited jurisdiction that derives its authority from the Internal Revenue Code. Sec. 7442. However, exercising jurisdiction over petitioner's recoupment defense does not require us to exercise jurisdiction that is beyond the scope of petitioner's main claim for the redetermination of its estate tax deficiency.

Although petitioner is, in actuality, the "plaintiff" in this suit, it is entitled to raise affirmative defenses to respondent's deficiency determination, such as res judicata, collateral estoppel, estoppel, waiver, duress, and the statute of limitations. Rule 39; see *Woods v. Commissioner* [Dec. 45,602], 92 T.C. 776, 784 (1989). In *Bull v United States* [35-1 USTC ¶ 9346], 295 U.S. 247, 260) (1935), the Supreme Court recognized that in tax refund cases, "the usual procedure for the recovery of debts is reversed * * *. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer." So it is in the Tax Court, where the taxpayer must sue the Commissioner of Internal Revenue to have a deficiency redetermined. As in the refund fore, the taxpayer in the Tax Court has the burden of proof. Rule 142(a); *Welch v. Helvering* [3 USTC ¶ 1164], 290 U.S. 111 (1933). When a taxpayer raises an affirmative defense to a deficiency determination, we need no additional source of jurisdiction to render a decision with respect to the defense. It is part of the entire action over which we have jurisdiction. As we

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letter No taxpayer would have any reason to litigate the deficiency and the recoupment issues separately, and in any event a judgment upon the former would bar a subsequent suit upon the latter under the doctrine of res judicata. [*Unired States v. Dalm* [90-1 USTC ¶ 60,0121], 494 U.S. 596, 615 n.3 (1990) (Stevens, J., dissenting).]

said in *Naftel v. Commissioner* [Dec. 42,414],85 T.C. 527, 533 (1985), when a taxpayer petitions this Court a redetermination of a deficiency, we take jurisdiction over the entire tax liability, not just the items determined to be erroneous by the Commissioner in the notice of deficiency. This is a proceeding to redetermine petitioner's estate tax deficiency, over which we clearly have jurisdiction. Therefore, in deciding this case, we may take into account all facts that hear on petitioner's deficiency and may apply equitable principles in so doing. Woods v Commissioner supra at 784-787.

In *Woods v. Commissioner*, supra at 784, we listed "numerous instances where we have applied equitable principles in deciding issues over which we had jurisdiction." These include the equity-based principles of waiver,[6] duty of consistency (quasi-estoppel),[7] estoppel,[8] substantial compliance,[9] abuse of discretion,[10] laches,[11] and the tax benefit rule.[12] In *Woods v. Commissioner*, supra at

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[6] *Armco, Inc. v Commissioner* [Dec 43,8531, 88 T.C. 946, 963 n. 8 (1987); *Aero Rental v. Commissioner* [Dec. 33,2331, 64 T.C. 331, 338 (1975).

[7] *Unvert v Commissioner* [Dec. 36,223], 72 T.C. 807. 814817 (1979), affd. [81-2 USTC ¶ 9567] 656 F.2d 483 (9th Cir. 1981); *Mayfair Minerals, Inc. v Commissioner* [Dec. 30,730], 56 T.C. 82 (1971), affd. per curiam [72-1 USTC 92791456 F.2d 672 (Sth Cir. 1972).

[8] *Boulez v Commissioner* [Dec. 37661], 76 T.C. 209 214-217 (1981), affd. [87-1 USTC ¶ 9177] 810 F.2d 209 (D.C. Cir. 1987).

[9] *Taylor v. Commissioner* [Dec. 34,332], 67 T.C. 1071, 1077-1078 (1977).

[10] *Estate of Gardner v. Commissioner* [Dec. 41,293], 82 T.C. 989 (1984).

[11] *Mecom v. Commissioner* [Dec. 49,373], 101 TC (1993), *Southern Pac. Transp. Co. v Commissioner* [Dec. 37,600], 75 T.C. 497, 840 (1980).

[12] *Rojas v. Commissioner* [Dec. 44,8051, 9] T.C. 1090 (1988), affd. [90-1 USTC ¶ 50,237] 901 F.2d 810 (9th Cir. 1990); see also *Hillsboro Natl. Bank v Commissioner* [83-1 USTC ¶ 9229], 460 U.S. 370 (1983).

789, we reformed an agreement to extend the statutory period of limitations on assessment by reason of the parties' mutual mistake in executing a Form 872-A. Thus, in a Tax Court proceeding, either party is free to raise equity-based defenses to the assertions of the other party, including equitable recoupment and the Court, insofar as it has jurisdiction over the main claim, is free to entertain those defenses. "While we cannot expand our jurisdiction through equitable principles, we can apply equitable principles in the disposition of cases that come within our jurisdiction." Id. at 784-785 (quoting Berkery v. Commissioner [Dec. 44,568], 90 T.C. 259, 270 (1988) (Hamblen, J., concurring)).

We find affirmative support for our decision today in sections 7422(e), 6512(a), and 7481. Section 7422(e) provides that when a petition is filed in the Tax Court, "the district court or the United States Claims Court, as the case may be. shall lose jurisdiction of taxpayer's suit [for refund] to whatever extent jurisdiction is acquired by the Tax Court of the subject mater [sic] of taxpayer's suit". Further, section 6512(a3 prohibits taxpayers from bringing suits for refund while simultaneously litigating the same issue in the Tax Court, and section ;481 provides for finality of Tax Court decisions, which have the effects of res judicata and collateral estoppel. *Commissioner v. Sunnen* [48-1 USTC ¶ 9230], 333 U.S. 591 (1948); *Stern v. United States*, 563 F. Supp. 484, 487 (D. Nev. 1983). As we said in *Woods v Commissioner, supra* at 788, these provisions indicate that "Congress intended the Tax Court to have full judicial authority to resolve issues over which it has jurisdiction".

> The combined effect of these sections is to channel tax litigation in the Tax Court, to make our decisions binding, and to preclude relitigation of the

> same issues in another forum. See *Estate of Ming v. Commissioner* [Dec. 32,686], 62 T.C. 519 (1974). This statutory scheme indicates that Congress did not intend to restrict our application of legal and equitable principles to decide matters within our jurisdiction unless it specifically enacted such a limitation. * * * [Id at 788-789.]

The origin of the view that the Tax Court lacks authority under sections 6214(b) and 6512(b) to apply equitable recoupment can be traced to one of the earliest Board of Tax Appeals decisions applying the doctrine of setoff[13]. *Barry v. Commissioner* [Dec. 68], 1 B.T.A. 156 (1924). In that case, the Commissioner determined an overassessment of income tax for 1920 and a deficiency for 1921, and proposed that the taxpayer remit the excess of the 1921 deficiency over the 1920 overassessment. The taxpayer petitioned the Board, arguing that he had wrongfully been denied unrelated depreciation deductions for 1920 and 1921, and sought to have the unrelated 1920 overpayment attributable to the disallowed depreciation deductions credited, by way of setoff, against his 1921 deficiency. The Commissioner moved to dismiss the petition on the ground that the Board had no jurisdiction over the taxable year 1920, inasmuch as the Commissioner had not determined a deficiency for that year. The Board of Tax Appeals held that it had jurisdiction over the case and

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[13] "On the differences between setoff and equitable recoupment see *Dysart v United States* [65-1 USTC ¶ 91881], 169 Ct Cl. 276, 281-282, 340 F.2d 624, 627-629 (1965); Saltzman, IRS Practice and Procedure, par. 5.06 [1] and [2], at 5-41 (2d ed. 1991 & Sopp. No. 2 1993); Andrews, "Modern Day Equitable Recoupment and the 'Two Tax Effect:' Avoidance of the Statutes of Limitation in Federal Tax Controversies", 28 Ariz. L Rev. 595, 615-619(1986).

allowed the unrelated 1920 overpayment to offset the 1921 deficiency.

In 1926, Congress enacted section 274(g) of the Revenue Act of 1926, ch. 27,44 Stat. 56, the statutory predecessor to section 6214(b).[14] This statute provided that in determining an income tax deficiency in respect of any taxable year the Board could consider such facts with respect to the taxes for the other taxable years as might be necessary to redetermine the amount of the deficiency, but in so doing would have no jurisdiction to determine whether the tax for other taxable years had been overpaid or underpaid. Thus, the statute precluded the Board from applying setoff to reduce a taxpayer's income tax deficiency for the taxable year before it by the amount of an unrelated income tax overpayment for another year, as it had done in *Barry v. Commissioner, supra.* However, there was nothing in section 274(g) of the Revenue Act of 1926 or its legislative history that indicates that Congress intended to deny the Board the power to apply the doctrine of equitable recoupment, a term not used in the statute, its legislative history, H. Rept. 1, 69th Cong., 1st Sess. 11 (1925), 1939-1 C.B. (Part 2), 315, 322, or the Board's opinion in *Barry v. Commissioner, supra.* Moreover, the facts of *Barry* did not lay the basis for an equitable recoupment defense by the taxpayer, the 1920 overpayment and the 1921 deficiency bore no relationship to each other. Thus Congress could not have enacted section 274(g) of the 1926 Revenue Act in response to the Board's exercise of recoupment jurisdiction. However, the Board thereafter interpreted section 274(g), reenacted as section 272(g) of later Revenue Acts and the 1939 Code, in conjunction

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[14] Reenacted in later Revenue Acts as sec. 272(g) and then codified as such in the Internal Revenue Code of 1939, and later as sec. 6412(b) of the Internal Revenue Codes of 1954 and 1986.

with section 322(d), I.R.C. 1939,[15] as denying it power to apply either setoff or equitable recoupment in income tax cases. See, *e.g., Red Wing Potteries. Inc. v. Commissioner* [Dec. 11,695], 43 B.T.A. 841 (1941); *Heyl v. Commissioner* [Dec. 9279], 34 B.T.A. 223, 226 (1936); *Cornelius Cotton Mills v Commissioner* [Dec. 1482], 4 B.T.A. 255, 256 (1926), see also Dubroff, The United States Tax Court: An Historical Analysis 484-485 (1979).

Commissioner v. Gooch Milling & Elevator Co. [43-2 USTC ¶9376], 320 U.S. 418 (1943), presented the question whether the Board had authority to apply equitable recoupment in income tax cases.[16] In Gooch Milling, the Commissioner examined the taxpayer's books for the taxable year ending June 30, 1935, and determined that it had erroneously overvalued its closing inventory as of that date. This determination affected the opening inventory for the taxable year ending June 30, 1936, and resulted in income and excess profits tax deficiencies for 1936. However, because of the inventory revaluation, the

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[15] Sec. 322(d), I.R.C. 1939, was the statutory predecessor to sec. 6512(b) See *supra* note 2.

[16] In 1938, Congress enacted the statutory mitigation provisions, currently sees 1311-1314, to allow correction of inconsistent provisions that would otherwise be barred by expiration of the statutory limitation period. Revenue Act of 1938, ch. 289, tit. V, sec. 820, 52 Stat. 447, 581, later codified as sec. 3801, I.R.C. 1939. The mitigation provisions were made retroactive to taxable years beginning Jan. 1, 1932, Revenue Act of 1938, ch. 289, tit. V, sec. 820(f), 52 Stat. 582, and ultimately provided relief to the taxpayer in *Gooch Milling & Elevator Co. v. United States* [48-1 USTC ¶ 9285], 111 Ct. Cl. 576, 78 F. Supp. 94, 97 (1948).

The legislative history of the mitigation provisions makes clear that they do not operate to allow a party to obtain relief from inconsistent tax treatment, the courts are free to resort to judicial doctrines, including equitable recoupment, to correct errors resulting from inconsistent tax treatment. S. Rep. 1567, 75th Cong., 3d Sess. (1938), 1939-1 C.B. (Part 2) 779, 814-817; see *Woods v. Commissioner* [Dec. 45,602], 92 T.C. 776, 786 (1989).

taxpayer's ending inventory for the taxable year ending June 30, 1935, also changed. As a consequence of the revaluation, the taxpayer had overpaid its 1935 income and excess profits taxes. However, because the statutory limitation period had expired on the 1935 overpayment, the taxpayer could not recover it as a refund. The taxpayer petitioned the Board of Tax Appeals for a redetermination of the 1936 deficiency and, in its amended petition, sought to have the 1935 overpayment applied as an offset against the 1936 deficiency. On the basis of its previous decisions, which had relied on section 274(g) of the Revenue Act of 1926, the Board of Tax Appeals, in a Memorandum Opinion dated Dec. 17, 1941, refused to grant this relief *Commissioner v. Gooch Milling & Elevator Co.*, supra at 419. The taxpayer appealed the Board's decision to the U.S. Court of Appeals for the Eighth Circuit, which reversed. *Gooch Milling & Elevator Co. v. Commissioner*, [43-1 USTC ¶ 9269], 133 F.2d 131, 134 (8th Cir. 1943). However, the Supreme Court reversed and held that the Board lacked jurisdiction to allow the 1935 income tax overpayment to be offset against the 1936 income tax deficiency.

Against this background, we interpret *Gooch Milling* as not preventing the Tax Court from considering the affirmative defense of equitable recoupment when it is properly raised in a timely suit for redetermination of a tax deficiency over which we have jurisdiction. See *United States v. Dalm* [90-1 USTC ¶ 60,012], 494 U.S. 596, 608 (1990). Further support for our holding that we have authority to apply equitable recoupment is that section 6214(b) specifically applies only to income and gift taxes and makes no mention of the estate tax. Because section 6214(b) omits any reference to the estate tax, *Commissioner v. Gooch Milling & Elevator Co., supra,* is not in point. Contrary to our holding in *Estate of Van Winkle v.*

Commissioner [Dec. 29,502], 51 T.C. 994 (1969). We find nothing in section 6214(b) that applies to the estate tax case now before us. As a result, we will no longer follow *Estate of Van Winkle* or any of our cases denying that we have authority to apply equitable recoupment.

In addition, section 6512(b), formerly section 322(d), I.R.C. 1939, does not preclude us from exercising jurisdiction over petitioner's equitable recoupment defense. Section 6512(b) simply confers authority, when we decide that a taxpayer has no deficiency but an overpayment of income tax, estate or gift tax, or certain excise taxes, to order the Commissioner to refund the overpayment. Sec. 6512(b)(2). As we explained in *Phillips Petroleum Co. v Commissioner* [Dec.45,667], 92 T.C. 885-889 (1989), "this Court's jurisdiction to determine an overpayment parallels its jurisdiction to redetermine a deficiency." Because this is not a proceeding for the redetermination of the Trust's 1986 income tax deficiency, we cannot exercise section 6512(b) overpayment jurisdiction over the Trust. However, this does not mean that we lack authority, in the exercise of our jurisdiction, to redetermine petitioner's estate tax deficiency by applying the doctrine of equitable recoupment.

Having concluded that we have authority to entertain petitioner's partial affirmative defense of equitable recoupment, we will deny respondent's motion to dismiss and order that tints case be set for further proceedings.

To reflect the foregoing,

An appropriate order will be issued.

Reviewed by the Court.

SHIELDS, CLAPP, SWIFT, JACOBS, GERBER, WRIGHT, PARR, WELLS, RUWE, COLVIN,

HALPERN, CHIECHI and LARO, JJ.., agree with the majority opinion.

CONCURRING OPINION

HALPERN, J., concurring: I agree with the majority and write separately only to address Judge Chabot's dissent.

Judge Chabot focuses narrowly on the precise role of this Court in the tax collection process. He observes that the Court's jurisdiction does not extend to enforcing collection: "this Court does not have jurisdiction to determine obligations to pay." Chabot op. p. 28. Because the Court does not deal with such obligations, Judge Chabot would find no purchase within our jurisdiction on which the doctrine of equitable recoupment could rest: "equitable recoupment [does] not [fit] into the deficiency jurisdiction that the Congress has given to this Court." *Id.*

Certainly, I agree with Judge Chabot that the Tax Court is a court of limited jurisdiction. I also agree that the instant case appears to invoke only our jurisdiction to redetermine the correct amount of a deficiency. Chabot op. Note 2. Nevertheless, we do exercise a portion of the judicial power of the United States, *Freytag v. Commissioner* [91-2 USTC ¶ 50,321], 501 U.S.—, —, 111 S. Ct. 2631, 2645 (1991), and Congress did intend us to have full judicial authority to resolve issues over which we have jurisdiction, *Woods v. Commissioner* [Dec. 45,602], 92 T.C.776, 788 (1989). Furthermore, equitable recoupment is a doctrine exercised by courts of law to render fundamental justice and equity in situations where a strict adherence to rules of pleading or the terms of the statutes of limitations would result in unfairness. See McConnell, "The Doctrine of Recoupment in Federal Taxation", 28 Va. L. Rev. 577 (1942). For those reasons and taking a somewhat less restrictive view of what it is that we do, I would find

adequate purchase in our jurisdiction on which to rest the doctrine of equitable recoupment.

The Nature of Recoupment

"The word 'recoupment' is derived from the French 'recouper'-'to cut again.' It signifies the right or act of making a reduction, defalcation, or discount * * * to the claim of the plaintiff. * * * [It] is a common law concept." McConnell, *supra* at 577-578. "[Recoupment] is the keeping back of something that is due, because there is an equitable reason to withhold it". *Wheat v. Dotson*, 12 Ark. 699, 702 (1852).

The Supreme Court of Illinois explained how recoupment functions:

> [Recoupment] adjusts by one action adverse claims growing out of the same subject-matter. * * * It is not necessary that the opposing claims should be of the same character. * * * *It is sufficient that the counter claims arise out of the same subject-matter, and that they are susceptible of adjustment in one action.* [Stow v. Yarwood, 14 111. 424, 426 (1853) emphasis added 1

Recoupment allowed the common law courts to overcome what might be described as jurisdictional limitations, and other limitations, that, formally, would have frustrated the claim of the party seeking relief. See, e.g., *Wheat v Dotson. supra* at 701 ("When a defendant, in a suit upon contract in a common law court, comes in and asks to be permitted to interpose a defense founded upon a partial failure of its consideration, he certainly applies for a kind of relief that I would have been refused him there peremptorily at one period in the history of those courts and which at that period could have been obtained only in the equity courts.") As one commentator put it:

> in factual situations where recoupment could aptly be applied, even the rigidly technical attitude of the common law courts through the early, middle and later periods of common law development did not blind the eves of the law judges to the practical necessity and fundamental reason in recoupment. * * *

McConneil, *supra* at 580.

Reasons for Recoupment

The reasons that compelled the old common law courts to allow recoupment are well known. See, e.g., *Dermott v Jones*, 64 U.S. 220 234 1859); *Wheat v Dotson*, *supra* at 703; *Stow v. Yaruood, supra* at 426. The common law courts were especially concerned with judicial administration factors such as the desire to "[avoid] circuity of action, [to avoid] multiplicity of suits, and [to do] complete justice in a single adjudication". McConnell, *supra* at 583; see also *Wheat v. Dotson*, *supra* at 703. One court stated that permitting recoupment is "perfectly just and equitable" and "calculated to do complete justice between the parties, without putting them to the expense of two suits". *Reab v. McAllister*, 8 Wend. 109, 117 (N.Y 1831). In addition to the judicial resource concerns, however, it must be kept in mind that recoupment did (and does) not simply permit justice to be done in a single action, but the doctrine itself "tends to promote justice". *Stow v Yarwood*, *supra* at 426. Thus, when the New York Court of Errors allowed recoupment, one member of the majority noted: "There is a natural equity especially as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be recovered."

Reab v. McAllister, *supra* at 115. Another judge in the *Reab v. .McAllister* majority stated "that equal and complete justice could not be meted" unless the defendant were permitted to set up evidence for recoupment. Id at 119. Indeed, when the Supreme Court first applied recoupment in the Federal taxation context, the Court noted that to do otherwise would result in an "immoral" and "unjust" retention of funds. *Bull v. United States* 135-1 USTC ¶ 9346], 295 U.S. 247, 261 (1935). Thus it occurred that the "rigid rules of the common law courts * * * materially yielded by a gradual process to the influence of common justice, common sense and common convenience " *Wheat v. Dotson*, *supra* at 703-704. It is difficult to deny that the administrative and fairness or equitable considerations of the common law courts should be of any less importance to us today.

What We Do

Judge Chabot is right: What we do in exercising our jurisdiction to redetermine deficiencies is to correct, if necessary, the amount that the Secretary may assess as a tax. See sec. 6215 Assessment is a necessary stop on the route of enforced collection. See secs. 6201, 6203, 6303. Barring our reversal on appeal or some extraordinary set of circumstances, once we have redetermined a deficiency, the taxpayer has no further opportunity for judicial review of the demand that he can expect to receive from the Secretary. See secs. 7481, 7421; see also *United States v. Dalm* [90-1 USTC ¶60,012], 494 U.S. 596 (1990) (tax refund courts are without jurisdiction to consider time barred refund claim based solely upon equitable recoupment), *Commissioner v. Sunnen* [48-1 USTC ¶ 9230], 333 U.S. 591 (1948) (final decisions of Tax Court have res judicata and collateral estoppel effect). I would, however,

take a broader view of our function than does Judge Chabot. I would view our function as being integral to the enforced collection of Federal tax liability. Indeed, as we have stated, the Code is structured to channel tax litigation to the Tax Court. *Woods v. Commissioner* [Dec. 45,602], 92 T.C. 776, 788-789 (1989). We are the tax forum of choice, because only here can the tax liability be litigated prior to payment. Understandably, we preside over the vast majority of tax litigation. What we do is so closely involved with the vast majority of litigated tax liabilities that I would conclude that, in a very real sense, what we do is to determine obligations to pay. For that reason, I would conclude that we can apply recoupment: "[Recoupment] is the keeping back of something that is due, because there is an equitable reason to withhold it". *Wheat v. Dotson*, *supra* at 702. When it is equitable to do so, if the other requirements of recoupment are met, I believe that we have authority to apply the doctrine to reduce a deficiency.

WRIGHT, PARR, and BEGHE, JJ., agree with this concurring opinion.

DISSENTING OPINION

Clusar, J., dissenting: The majority hold that this Court is authorized to apply the doctrine of equitable recoupment. However, they fail to consider whether equitable recoupment could be applied within the confines of our statutory jurisdiction, and they fail to consider the differences between this Court's work and the work of the refund fore that now apply the doctrine.

I. Tax Court's Jurisdiction

"The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title" [i.e., title 26] .and other statutes Sec. 7442. [1]

The Tax Court has jurisdiction to redetermine the correct amount of a deficiency"[2] Sec. 6214(a). "Deficiency" is a defined term. Sec. 6211. It depends generally on the relationship between the amount of the tax imposed on the taxpayer and the amount the taxpayer showed as the tax on the tax return. The amount of the tax imposed depends on a variety of factors, involving the nature of the tax. The instant case is an estate tax case, and the tax involved is imposed by subtitle B. The amount of the tax imposed is affected by inclusions exclusions. deductions, and credits, all of which are specified by statute. In this instance, as we said at the start of our opinion in *Estate of Mueller v. Commissioner* [Dec. 48,225(M)], T.C. .Memo. 1992-284, "The sole issue for decision is the date-of-death fair market value of the 8,924 shares of common stock of the Mueller Co. (the Company) included in the gross estate of Bessie 1. Mueller (decedent)." (Emphasis added.)

The majority do not reveal to US where in subtitle B, or anywhere else in the Internal Revenue Code, is the element of petitioner's tax that might be affected by

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[1] Unless indicated otherwise, all section references are to sections of the Internal Revenue Code of 1986 as in effect for the date the petition was filed in the instant case; except that references to sec. 6211 and other provisions affecting the amount of the deficiency are to sections of the Internal Revenue Code of 1986 as in effect for the date of decedent's death.

[2] The Tax Court has, and has had, many other categories of jurisdiction (e g., declaratory Judgment, sec. 6621(C), litigation costs, administrative costs, TEFRA partnership and subchapter S litigation, and overpayments) specifically granted by statute, but the instant case apparently involves only redetermination of a deficiency.

possible application of equitable recoupment. Obviously, equitable recoupment does not affect the amount shown as the tax on the taxpayer's tax return. It appears that the doctrine of equitable recoupment does not affect what we have already described as the "sole issue for decision" in the instant case, or any other element of the Internal Revenue Code that is to be taken into account in determining the amount of any deficiency in the instant case.

Thus, the majority appear to ignore both the structure and the letter of the Internal Revenue Code in their attempt to advise the parties that we have jurisdiction to apply equitable recoupment in the instant case.

II. Refund Fora's Jurisdiction

The majority appear to analyze the problem of this Court's jurisdiction by reference to the general objective of the doctrine of equitable recoupment and the fact that the doctrine is applied in certain courts in refund cases.

This Court's jurisdiction focuses on redetermination a "deficiency", which compares (1) the tax imposed by the appropriate Code provision with (2) the tax shown on the tax return. In contrast, a refund suit before a District Court or the Court of Federal Claims depends on a showing that the tax collector has money which should be paid back to the taxpayer. The following description from Junghans & Becker, Federal Tax Litigation- Civil Practice and Procedure, par. 18.01 (2d ed. 1992), is a useful brief description of the situation.

> 18.01 THEORY OF TAXPAYER'S CASE
>
> Tax refund suits brought by a taxpayer against the tax collector have long been recognized in the law[1]

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as actions in the nature of a suit for money had and received.[2] As stated by the Supreme Court, " An action brought to recover a tax erroneously paid, although an action at law, is equitable m its function. It is the lineal successor of the common count *indebitatus assumpsit* for money had and received."[3]

The ultimate issue in a tax refund suit is whether the taxpayer has overpaid his taxes for the period in issue.[4] The Supreme Court has said that taxes are considered to have been overpaid whenever the taxpayer has made

any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in Judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment o more than is rightfully due is what characterizes any overpayment.[5]

Thus, the taxpayer has a different burden of proof in a tax refund suit from that in a case filed in the Tax Court.[6] Unlike a Tax Court case, a tax refund suit is not, strictly speaking, a judicial review of the determination of an administrative agency. Rather, it is a suit in which the taxpayer must establish that the government has money that it should refund to him.[7] Accordingly, in a tax refund suit, the taxpayer

must not merely prove that the Internal Revenue Service (the Service) improperly made an assessment, he must go further and establish the correct amount of his tax liability for the periods in issue.[8] It is only when the court can ascertain the amount of tax that the taxpayer should have paid that it can ascertain whether there was an overpayment of tax and that a refund is due.[9] In sum m a tax refund suit the taxpayer's theory is that he can prove he overpaid his true tax liability for the taxable periods in issue.

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[1] In the United States tax refund suits were being litigated long before the creation 2f the Service. See, e.g., *Bend v Hoyt*, 38 US 263 (1839).

[2] An action in assumpsit for money had and received is equitable in character and lies, in general, whenever a defendant has received money that in equity and good conscience he ought to pa to plaintiff Black's Law Dictionary 112 5th ed. 1979).

[3] *Stone v White* [37-1 USTC ¶ 9303],301 US 532, 534 (1937).

[4] Note that under Section 6402(a), only the Commissioner is allowed to refund overpayments of tax. See *Reinecke v. Spalding* [2 USTC ¶ 452], 232-233 (1930).

[5] *Jones v Liberty Class Co.* [48-1 USTC ¶ 9113] 332 US 524, 531 (1947); see also IRC §§ 6401, 6403 for Code definition of overpayment," and note what [that ?] it leaves open the possibility of other payments being treated as overpayments.

[6] See infra ¶ 18.03[1] and compare with ¶ 12.01.

[7] *Taylor v. Comm'r* [1934 CCH ¶ 9283], 70 F.2d 619, 620-621 (2d Cir. 1934), aff'd sub nom. *Helvering v. Taylor* [35-1 USTC ¶ 9044] 293 US 507 (1935).

[8] *United States v. Janis* [76-2 USTC ¶ 16,229], 428 US 433 (1976), *Taylor v Comm'r*, supra note 7; *Lewis v. Reynolds* [3 USTC ¶ 856], 284 US 281 (1932); *Compton v. United States* [64-2 USTC ¶ 15,578], 334 F2d 212 (4th Cir. 1964), *Forbes v Hassett* [42-1 USTC ¶ 10,127], 124 F2d 925 (1st Cir. 1942).

[9] *Decker v. Korth* [55-1 USTC ¶ 9225], 219 F2d 732, 737 (10th Cir. 1955); *Hodah v. United States* [57-2 USTC ¶ 9928], 153 F.Supp. 822 (ND Ohio 1957).

In the context of considering whether the tax collector should refund to the taxpayer any specific amount of money that the taxpayer has paid to the tax collector, there has developed the concept of equitable recoupment as a doctrine hat affects the "oughtness" of any such refund. Thus, it may be more productive of understanding to say that equitable recoupment fits into the refund jurisdiction of certain fora, and not that those fora have equitable recoupment jurisdiction.

In contrast, this Court does not have jurisdiction to determine obligations to pay. Rather, this Court has jurisdiction to determine whether, and in what amount, there is a deficiency—a limited, statutorily defined term of art. With exceptions not relevant to the instant case, payments are not taken into account in determining the amount of a deficiency. E.g. *Logan v Commissioner* [Dec. 43,117], 86 T.C 222, 1227-1230 (1986). The question of whether the taxpayer "ought" to make more payments does not arise under our deficiency jurisdiction. Thus, it is not a matter of this Court's not having equitable recoupment

jurisdiction, but rather of equitable recoupment not fitting into the deficiency jurisdiction that the Congress has given to this Court.

III. Other Considerations

(A) In their opinion, the majority state that equitable recouprrent, "as an affirmative defense, * * * comes within our jurisdiction to redetermine petitioner's estate fax deficiency." Majority op. p. 4. The majority do not explain what element in the calculation of the deficiency under section 6211 would be altered by any decision to apply the doctrine of equitable recoupment.

(B) In their opinion, the majority refer us to *Naftel v. Commissioner* [Dec. 42,414], 85 T.C. 527, 533 (1985), for the proposition that "when a taxpayer petitions this Court for a redetermination of a deficiency we take jurisdiction over the entire tax liability, not just the items determined to be erroneous by respondent in the notice of deficiency." Majority op. p. 10. Although this appears to be a reasonable description of what we said in *Naftel*, *Naftel* does not support the position of the majority in the instant case, but rather *Naftel* illustrates why the majority are wrong.

In *Naftel*, we dealt with the Commissioner's motion for summary judgment that we did not have jurisdiction to rule on the taxpayer's contentions regarding refund checks issued by the Commissioner but not received by the taxpayer. We denied the motion, because we believed that resolution of the refund check question could affect the amount of the taxpayer's overpayment under section 6512(a), and we had jurisdiction to determine the amount, if any, of any such overpayment. In the instant case, by contrast, the majority make no effort to show how equitable recoupment would affect the amount of the

deficiency otherwise resulting from our determination in Estate of Mueller v. Commissioner [Dec. 48,225(M)], T.C. Memo. 1992-284, and the majority appear to expressly negate the possibility of equitable recoupment effecting any overpayment. Majority op. p. 3.[3]

Similarly, in *Powerstein v. Commissioner* [Dec. 48,554] 99 T.C. 466 (1992), we relied on *Naftel* in granting a taxpayer's motion to enjoin assessment pursuant to the authority expressly granted to this Court by the last two sentences of section 6213(a). As part of our analysis, we held that if a taxpayer's amended tax return clearly indicates that the taxpayer is protesting and not admitting the amount shown as the tax on the amended tax return, then this amount does not constitute "the amount shown as the tax by the taxpayer upon his return." within the meaning of section 6211(a)(l)(A). In coming to this conclusion, we relied on section 301.6211-1(a), Proced. & Admin. Regs. *Id.* at 474-475. In contrast, in the instant case, the majority do not suggest any basis in the Internal Revenue Code, or the regulations, or the case law for concluding that equitable recoupment would affect the amount of any deficiency to be entered.

(C) In their opinion, the majority state that they "find affirmative support * * * in sections 7422(e), 6512(a), and 7481." Majority op. p. 11. None of these sections provides a clue as to how application of the doctrine of equitable recoupment affects the amount of petitioner's deficiency in the instant case.

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[3] Compare the instant case with Barton v Commissioner [Dec. 47,740], 97 T.C. 548, 554-555 (1991), where we explained how we could have authority to deal with some matters under our overpayment jurisdiction even though we held in White v. Commissioner [Dec. 46,844], 95 T C. 209 1990), that we did not have authority to deal with the same matters under our deficiency jurisdiction.

(D) Finally, it has been suggested that equitable recoupment might play a part in the definition of deficiency in that the amount to be equitably recouped—in the instant case, presumably the amount paid by the trust on an understanding of the facts inconsistent with this Court's holding in *Estate of Mueller v. Commissioner* [Dec. 48,225(M)], T.C. Memo. 21992-284—may be taken into account under section 621 1(a)(1)(B).

We have interpreted the wonderfully detailed definition of deficiency in section 6211[4] by giving effect to

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[4] Section 5211 provides as follows:

SEC. 6211 DEFINITION OF A DEFICIENCY.

(a) In General.-For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, 44, and 4s the term "deficiency" means the amount by which the tax imposed by subtitle A or s. or chapter 41, 42, 43, 44, or 4s exceeds the excess of-

(1) she sum of

(A) the amount shown by the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon.

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over-

(2) the amount of rebates, as defined in subsection (b)(2), made.

(b) Rules for Application of Subsection (a)—For purposes of this section—

(1) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to the payments on account of estimated tax, without regard to the credit under section 31. without regard to the credit under section 33, and without regard to any credits resulting from the collection of amounts assessed under section 6851 (relating to termination assessments).

(2) The term "refute" means so much of an abatement credit, refund, or other repayment, as was made on the ground that the tax imposed by subtitle A or B or chapter 41, 42, 43, 44, or 45 was less than the excess of the amount specified in subsection (a)(l) over the refutes previously made.

(3) The computation by the Secretary, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

(4) For purposes of subsection (a)—

(A) any excess of the sum of the credits allowable under sections 32 and 34 over the tax imposed by subtitle A (determined without regard to such credits), and

(B) any excess of the sum of such credits shown by the taxpayer on his return over the amount shown as the tax by the taxpayer on such return (determined without regard to such credits),

shall be taken into account as negative amounts of tax.

(5) The amount withheld under section 4995(a) from amounts payable to any producer for crude oil removed during any taxable period (as defined in section 4996(b)(7)) which is not otherwise shown on a return for the taxable period.

(6) Any liability for any amounts required to be withheld under section 4995(a) shall not be treated as a tax imposed by chapter 45.

[The subsequent amendments of this provision by sec. 10713(b)(2) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, 101 Stat. 1330, 1330-470 (effective Dec. 22, 1987); and by secs. 1941(b)(2)(B)(i), 1941(b)(2)(B)(ii), 1941(b)(2)(C), and 1941(b)(2)(D) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107,1322-1323 (effective Aug. 23, 1988), do not affect the instant case.]

[Although decedent died in 1986, the above text reflects the amendment made by sec. 1015(r)(2) of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3342, 3572-3573. This 1988 Act amendment is taken into account because it applies to notices of deficiency in the instant case was mailed on Nov. 9, 1989.]

each element of that statutory definition.[5] E.g. *Patronik-Holder v Commissioner* [Dec. 49,003], 100 T.C. 374, 381 (1993); *Kroh v. Commissioner* [Dec. 48,128], 98 T.C. 383, 392-397 (1992);[6] *Balduin v. Commissioner* [Dec. 47,900], 97 T.C. 704 (1991); *White v. Commissioner* [Dec. 46,844], 95 T.C. 209 (1990). These recent opinions, two of them Court-reviewed, make it clear that, in a deficiency case, it is not enough that there is a general desire to resolve real disputes between the Commissioner and a taxpayer; the dispute in question must fit into the detailed definition of the word "deficiency".

IV Conclusion

Because the equitable recoupment dispute between the parties does not fit into our deficiency jurisdiction, apparently cannot fit into our overpayment jurisdiction, and has not been suggested as fitting into any of our miscellaneous jurisdictions (see *supra* note 2), I would grant respondent's motion to dismiss petitioner's equitable recoupment affirmative defense. From the majority's decision to deny that motion, I respectfully dissent.

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[5] As we noted in *Murphree v. Commissioner* [Dec. 43,531], 87 T.C. 1309 (1986), some parts of the definition of deficiency may have been placed by the Congress outside sec. 6211; in *Murphree*, the definitional element appeared in what was then sec. 46(a)(10)(C)(ii). In *White v. Commissioner* [Dec. 46,844], 95 T.C. 209 (1990), we held in effect that an element of the definition of a deficiency appeared in sec. 6601(e)(1).

[6] Note that the dissent in *Kroh v. Commissioner* [Dec. 48,128], 98 T.C. 383 (1992), goes only to the question of res judicata (*Id.* at 404-413). And does not dispute the majority's conclusion that assessments against the taxpayer's husband do not affect the amount of the deficiency against the taxpayer, and that "we may adjudicate the correctness of ***[the taxpayer's] tax deficiencies and additions to tax, in their entirety, as those amounts appear in the deficiency notices." *Id.* 397.

HAMBLEN, PARKER, COHEN and WHALEN, JJ., agree with this dissenting opinion.

§ 6214. Determinations by Tax Court

(a) Jurisdiction as to Increase of deficiency, additional amounts, or additions to the tax.—Except as provided by section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.

(b) Jurisdiction over other years and quarters.—The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.

(c) Taxes imposed by section 507 or chapter 41, 42, 43, or 44.—The Tax Court, in redetermining a deficiency of any tax imposed by section 507 or chapter 41, 42, 43, or 44 for any period, actor failure to act, shall consider such facts with relation to the taxes under chapter 41, 42, 43, or 44 for other periods, acts, or failures to act as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the taxes under chapter 41, 42, 43, or 44 for any other period, act, or failure to act have been overpaid or underpaid. The Tax Court, in redetermining a deficiency of any second tier tax (as defined in section 4963(b)), shall make a determination

with respect to whether the taxable event has been corrected.

(d) Final decisions of Tax Court.—For purposes of this chapter, chapter 41, 42, 43, or 44, and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

(e) Cross references.—

(1) For provision giving Tax Court Jurisdiction to determine whether any portion of deficiency Is a substantial underpayment attributable to tax motivated transactions, see section 6621(c)(4).

(2) For providing giving Tax Court Jurisdiction to order a refund of an overpayment and to award sanctions, see section 6512(b)(2).

§ 6512. Limitations in case of petition to Tax Court

(a) Effect of petition to Tax Court.—If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) (or 7481(c) with respect to a determination of statutory interest or section 7481(d) solely with respect to a determination of estate tax by the Tax Court), no credit or refund of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except-

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final; and

(3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive,' and

(4) As to overpayments attributable to partnership items, in accordance with subchapter C of chapter 63.

(b) Overpayment determined by Tax Court—

(1) Jurisdiction to determine.—Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

(2) Jurisdiction to enforce.—If, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest.

(3) Limit on amount of credit or refund.—No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid-

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511(b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency—

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

(c) Cross references.—

(1) For provision allowing determination of tax In title 11 cases, see section 505(a) of title 11 of the United States Code.

(2) For provision giving the Tax Court Jurisdiction to award reasonable litigation costs in proceedings to enforce an overpayment determined by such court, see section 7430.

Supreme Court, U.S.
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No. 98-794

In the Supreme Court of the United States

OCTOBER TERM, 1998

ESTATE OF BESSIE I. MUELLER, DECEASED, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Tax Court has authority to grant relief under the doctrine of equitable recoupment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bull v. *United States*, 295 U.S. 247 (1935)	3
Commissioner v. *Gooch Miling & Elevator Co.*, 320 U.S. 418 (1943)	3, 6, 8
Continental Equities, Inc. v. *Commissioner*, 551 F.2d 74 (5th Cir. 1977)	8
Estate of Schneider v. *Commissioner*, 93 T.C. 568 (1989)	5, 7
Estate of Van Winkle v. *Commissioner*, 51 T.C. 994 (1969)	7
O'Brien v. *United States*, 766 F.2d 1038 (7th Cir. 1985)	4
Phillips Petroleum Co. v. *Commissioner*, 92 T.C. 885 (1989)	7
Poinier v. *Commissioner*, 86 T.C. 478 (1986), aff'd in part and rev'd in part on other issues, 858 F.2d 917 (3d Cir. 1988), cert. denied, 490 U.S. 1019 (1989)	7
Rothensies v. *Electric Storage Battery Co.*, 329 U.S. 296 (1946)	4, 7, 8
United States v. *Dalm*, 494 U.S. 596 (1990)	8, 9, 10
Vandenberge v. *Commissioner*, 3 T.C. 321 (1944), aff'd, 147 F.2d 167 (5th Cir.), cert. denied, 325 U.S. 875 (1945)	7

Constitution and statutes:	Page
U.S. Const. Art. I	4, 8
Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 730-736	8
Internal Revenue Code (26 U.S.C.):	
§ 6212	4
§ 6512(b)(1)	4, 5
§ 6213(a)	4
§ 6214(b)	5
§ 7442	4
Miscellaneous:	
A. Andrews, *Modern-Day Equitable Recoupment and the "Two Tax Effect:" Avoidance of the Statutes of Limitation in Federal Tax Controversies*, 28 Ariz. L. Rev. 595 (1986)	7-8
H. Dubroff, *The United States Tax Court-An Historical Analysis* (1979)	7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 153 F.3d 302. The opinion of the Tax Court on the issue of equitable recoupment (Pet. App. 13a-43a) is reported at 101 T.C. 551. Other opinions of the Tax Court in this case are reported at 63 T.C.M. (CCH) 3027 and 107 T.C. 189.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1998. The petition for a writ of certiorari was filed on November 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Bessie I. Mueller died on March 24, 1986. Her estate, which is a petitioner in this case, filed a timely return that reported an estate tax liability of $5,523,953. The gross estate included shares of Mueller Company stock valued at $1505 per share. The Commissioner of Internal Revenue determined on audit that the Mueller Company stock should have been valued at $2150 per share. As a result, even though the estate was entitled to a credit of $1,152,649 that it had failed to claim for prior tax payments, the Internal Revenue Service determined that petitioners had underreported their estate tax liability (Pet. App. 4a-5a; C.A. App. 6).

Petitioners sought a redetermination of this estate tax liability in the Tax Court. After a trial, the court concluded that the Mueller Company stock had a value of $1700 on the date of Mrs. Mueller's death. This valuation resulted in an estate tax deficiency that was smaller than the amount of the credit to which petitioners were entitled. The Tax Court therefore determined that petitioners had overpaid their estate taxes (Pet. App. 5a).

Under this valuation of the Mueller Company stock, petitioners had reported too large a capital gain (and too great an income tax liability) when they sold the stock after decedent's death. Petitioners had failed, however, to file a timely protective claim for refund of the income tax that they had paid. During the pendency of the Tax Court proceeding, petitioners instead filed an amended complaint alleging that, under the doctrine of equitable recoupment, the time-barred income tax overpayment should be offset against the asserted estate tax deficiency (Pet. App. 5a).

2. After the Tax Court entered its opinion on valuation, respondent moved to dismiss the claim based upon equitable recoupment for lack of jurisdiction. In a reviewed opinion, a divided Tax Court held that it had authority to entertain the affirmative defense of equitable recoupment (Pet. App. 13a-43a). In a subsequent opinion issued following further trial proceedings, the Tax Court held, by a twelve to five vote, that the doctrine of equitable recoupment was inapplicable upon the facts of this case. 107 T.C. 189 (1996).

3. The court of appeals affirmed the dismissal of the equitable recoupment claim. Relying on this Court's decision in *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943), the court of appeals held that the Tax Court lacked jurisdiction to consider claims for equitable recoupment (Pet. App. 1a-12a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that the Tax Court lacks jurisdiction to consider a claim based upon the doctrine of equitable recoupment. The doctrine of equitable recoupment may provide relief from the effect of statutes of limitations by permitting a taxpayer, in certain limited circumstances, to set off ("recoup") a time-barred tax overpayment against an inconsistent tax liability timely asserted against him by respondent with respect to the same transaction. The doctrine of equitable recoupment is "in the nature of a defense arising out of some feature of the transaction upon which plaintiff's action is grounded." *Bull* v. *United States*, 295 U.S. 247, 262 (1935). "Recoupment

* * * will permit the government to recoup a correctly assessed tax, which ordinarily could not be collected because of a statute of limitations bar, against a timely refund of a tax erroneously collected and conversely will permit a taxpayer to recoup an erroneously paid tax, the refund of which is time-barred, against a timely and correctly asserted deficiency by the government." *O'Brien* v. *United States*, 766 F.2d 1038, 1049 (7th Cir. 1985). To be eligible for recoupment, the time-barred claim must stem from the same transaction that gave rise to the timely refund or deficiency claim. See *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946); *O'Brien*, 766 F.2d at 1049.

As these authorities have made clear, a threshold requirement for equitable recoupment in a taxpayer's favor is that there be a time-barred overpayment of tax to be "recouped" against the tax liability that is the subject of the timely suit. The Tax Court, however, is an Article I court that has only a limited statutory jurisdiction.[1] In particular, the jurisdiction of the Tax Court to determine tax overpayments and to redetermine deficiencies under Section 6512(b)(1) of the Code is expressly limited to determining overpayments of tax by the taxpayer of the tax *in respect of which the*

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[1] The jurisdiction of the Tax Court is defined in 26 U.S.C. 7442, which provides:

> The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2 3, and 4 of the Internal Revenue Code of 1939, by title II and III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

The Tax Court has jurisdiction under 26 U.S.C. 6213(a) to redetermine deficiencies in income, estate, gift, and certain excise taxes that have been the subject of a notice of deficiency issued pursuant to 26 U.S.C. 6212.

deficiency was determined. 26 U.S.C. 6512(b)(1). The Tax Court has not been given jurisdiction to determine an overpayment of a tax that was not the subject of a notice of deficiency and a timely petition for redetermination. *Estate of Schneider* v. *Commissioner*, 93 T.C. 568, 570 (1989).

The Tax Court therefore had jurisdiction in this case to determine that petitioners had overpaid estate taxes —the tax in respect of which the Commissioner determined a deficiency. The income tax liability of the estate, however, was *not* the subject of a deficiency notice or of a timely petition to the Tax Court. Under 26 U.S.C. 6512(b)(1), the Tax Court therefore had no jurisdiction to determine whether petitioners overpaid the income tax on the gain resulting from the sale of Mueller Company stock.[2] Because the court had no jurisdiction to determine whether an overpayment of the income tax had occurred, it had no jurisdiction to apply the doctrine of equitable recoupment in determining the estate tax liability in this case.

More than fifty years ago, this Court reached precisely this same conclusion in holding, under the sub-

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[2] In certain circumstances, the Tax Court may consider *facts* pertaining to taxable years other than a year to which a petition for redetermination of a deficiency relates. Specifically, "[t]he Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but *in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.*" 26 U.S.C. 6214(b) (emphasis added). The facts pertaining to other taxable *periods* might be relevant, for example, when the amount of the deficiency before the Tax Court is affected by the amount of carryovers from other taxable periods.

stantially identical predecessors of these statutes, that the predecessor of the Tax Court (the Board of Tax Appeals) lacked jurisdiction to consider equitable recoupment claims. *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943). Because the Board was not a court "possessing general equity jurisdiction" and, in particular, lacked authority to determine overpayments of any tax "other than the one for which a deficiency has been assessed," the Court concluded that the Board had no authority to consider "the plea of equitable recoupment" based upon such "other" taxes. *Id.* at 421-422. The Court explained its reasoning in detail (*id.* at 420-421 (footnotes omitted)):

> The Commissioner assessed a deficiency only for the 1936 fiscal year and it was this assessment of which the respondent sought a review. The Board thus had jurisdiction to do no more than redetermine the 1936 deficiency distinct from any overpayment or underpayment in any prior or subsequent year. There was no occasion here for the Board to exercise its power under § 272(g) to consider any facts relating to the taxes for the 1935 fiscal year. The redetermination of the tax liability for the 1936 fiscal year was in no way dependent on any prior tax assessment or overpayment. Likewise, neither the fact that the prior overpayment could no longer be refunded nor the fact that the overpayment exceeded the amount of the deficiency had any relevance whatever to the redetermination of the correct tax for the 1936 fiscal year. The respondent, in other words, was seeking to have the 1935 overpayment used, not as an aid in redetermining the 1936 deficiency, but as an affirmative defense or offset to that deficiency.

> This necessarily involved a determination of whether there was an overpayment during the 1935 fiscal year. The absolute and unequivocal language of the proviso of § 272(g), however, placed such a determination outside the jurisdiction of the Board. Thus to allow the Board to give effect to an equitable defense which of necessity is based upon a determination foreign to the Board's jurisdiction would be contrary to the expressed will of Congress.

Soon thereafter, the Court referred to its decision in *Gooch Milling* in noting that "we have held that the Tax Court has no jurisdiction to consider recoupment." *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. at 303. Indeed, until its decision here, the Tax Court has also consistently held that it lacks jurisdiction to consider equitable recoupment. *Estate of Schneider* v. *Commissioner*, 93 T.C. 568 (1989); *Phillips Petroleum Co.* v. *Commissioner*, 92 T.C. 885 (1989); *Poinier* v. *Commissioner*, 86 T.C. 478, 490-491 (1986), aff'd in part and rev'd in part on other issues, 858 F.2d 917 (3d Cir. 1988), cert. denied, 490 U.S. 1019 (1989); *Estate of Van Winkle* v. *Commissioner*, 51 T.C. 994, 999-1000 (1969); *Vandenberge* v. *Commissioner*, 3 T.C. 321, 327-328 (1944), aff'd, 147 F.2d 167 (5th Cir.), cert. denied, 325 U.S. 875 (1945). The commentators have also agreed that the Tax Court lacks authority to consider equitable recoupment. *E.g.*, H. Dubroff, *The United States Tax Court—An Historical Analysis* 484-488 (1979); A. Andrews, *Modern-Day Equitable Recoupment and the "Two Tax Effect:" Avoidance of the Statutes of Limita-*

tion in Federal Tax Controversies, 28 Ariz. L. Rev. 595, 614 (1986).[3]

As the court of appeals correctly held (Pet. App. 10a), the reasoning and conclusion of *Gooch Milling* remain valid. "Until Congress deems it advisable to allow the [the Tax Court] to determine the overpayment or underpayment in any taxable year other than the one for which a deficiency has been assessed, the [Tax Court] must remain impotent when the plea of equitable recoupment is based upon an overpayment or underpayment in such other year." 320 U.S. at 422.

2. Petitioners err in contending (Pet. 17–18) that the decision in *Gooch Milling* is ambiguous in its application to equitable recoupment claims. In *Gooch Milling*, the Court stated that the sole question before it was "[t]he jurisdiction of the Board of Tax Appeals to determine and apply a prior tax overpayment against a tax deficiency for a particular year" (320 U.S. at 418-419). Contrary to petitioners' assertion (Pet. 17-18 & n.16), the Court was not confused in *Gooch Milling* as to whether it was addressing the applicability of equitable recoupment, as distinguished from setoff. The Court stated that the Board's "want of jurisdiction to apply the doctrine of equitable recoupment in this case" was "manifest from [the applicable] statutory provisions" (320 U.S. at 420). See also *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. at 303 (noting *Gooch Milling* holds "that the Tax Court has no jurisdiction to consider recoupment").

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[3] Nothing in the legislation that made the Tax Court an Article I legislative court (Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 730-736) alters this analysis or affects this conclusion. See *Continental Equities, Inc.* v. *Commissioner*, 551 F.2d 74, 82-84 (5th Cir. 1977).

3. a. Petitioners also are incorrect in contending (Pet. 18-21) that *Gooch Milling* has been "superceded" by the decision in *United States* v. *Dalm*, 494 U.S. 596 (1990). *Dalm* provides no support for the proposition that the Tax Court has authority to grant equitable recoupment. The *Dalm* case addressed the unrelated question whether "the doctrine of equitable recoupment supports a separate suit for refund" of a time-barred gift tax when the taxpayer had settled a Tax Court deficiency proceeding in which the transferred property was treated as an item of income by agreeing "to pay income tax on the transaction." *Id.* at 598. The Court held in *Dalm* that the doctrine of equitable recoupment did not provide an independent basis for jurisdiction in the district court over the time-barred refund claim of the gift tax payment. *Id.* at 611.

The Court noted in *Dalm* that the taxpayer in that case had not attempted to raise a recoupment claim in the prior Tax Court proceeding. The Court emphasized that "[w]e have no occasion to pass upon the question whether Dalm could have raised a recoupment claim in the Tax Court." 494 U.S. at 611 & n.8. The decision in *Dalm* thus plainly does not address, much less purport to alter, the longstanding determination of this Court in *Gooch Milling* and *Rothensies* that the Tax Court lacks jurisdiction over equitable recoupment claims.

b. Petitioners, however, do not rely on *Dalm* for what it actually held. Instead, they note that in *Dalm* the Court stated that a district court lacks jurisdiction to adjudicate a claim for recoupment of a time-barred overpayment when it does not have jurisdiction over the tax claim against which equitable recoupment might properly be had. 494 U.S. at 611. Petitioners assert (Pet. 20) that *Dalm* therefore supports the proposition that, if *any* court has jurisdiction over the

tax claim against which equitable recoupment might properly be had, then it would also have jurisdiction over the time-barred recoupment claim.

While it is certainly true under *Dalm* that a *district court* that has jurisdiction over what petitioners refer to as the "main action" (Pet. 20) has authority to adjudicate the recoupment claim as well (see 494 U.S. at 611), it does not follow that the *Tax Court* has authority to decide a recoupment claim merely because it has jurisdiction over the "main action." To the contrary, as the Court held in *Gooch Milling*, due to the specific limitations that Congress has placed upon its jurisdiction, the Tax Court lacks authority to decide equitable recoupment claims, even when it has jurisdiction over the "main action."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1999

Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98-794

In the

Supreme Court of the United States

October Term, 1998

ESTATE OF BESSIE I. MUELLER, DECEASED, JOHN S. MUELLER AND MILTON W. BUSH, SR., PERSONAL REPRESENTATIVES,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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23pp

Table of Contents

Table of Authorities ii

Reason for Supplemental Brief 1

Facts and Holding in *Flight Attendants* Case 1

I. The *Flight Attendants* Case Provides Additional Reason To Grant Petition for Certorari Because It Is in ConflictWith Decision of Sixth Circuit Court of Appeals Below On Issue Of Tax Court Jurisdiction To Consider Equitable Defenses 4

II. Equitable Recoupment Is Well Established As An Available Defense In Tax Cases Which The Tax Court Has Jurisdiction To Consider Under The Decision In The *Flight Attendants* Case 5

Conclusion 8

Supplemental Appendix

Flight Attendants Against UAL Offset (FAAUO) and United Air Lines, Inc. v. Commissioner, 1999 U.S. App. Lexis 493 ..... 1sa

Table of Authorities

Cases

Bokum v. Commissioner, 992 F.2d 1136 (11th Cir. 1993) 3

Buchine v. Commissioner, 20 F.3d 173 (5th Cir. 1994) 3

Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943) 2

Commissioner v. McCoy, 484 U.S. 3 (1987) 2, 3

Dalm v. United States, 494 U.S. 596 (1990) 3

Flight Attendants Against UAL Offset (FAAUO) and United Air Lines, Inc. v. Commissioner, 1999 U.S. App. Lexis 493 ..... 1, 4, 5

Freytag v. Commissioner, 501 U.S. 868 (1991) 2, 3

Kelley v. Commissioner, 45 F.3d 348 (9th Cir. 1995) 3

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994) 2

Mueller v. Commissioner, 101 T.C. 551 (1993) 3

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) 2

Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929) 2

Shepherd v. Commissioner, 147 F.3d 633 (7th Cir. 1998) 4

Woods v. Commissioner, 92 T.C. 776 (1989) 3

Statutes

26 U.S.C. sec. 7476 1

Reason for Supplemental Brief

This Supplemental Brief is submitted pursuant to Rule 15.8. The purpose of this Supplemental Brief is to direct the Court's attention to the recent case of *Flight Attendants Against UAL Offset (FAAUO) and United Air Lines, Inc. v. Commissioner,* Nos. 97-3151 and 97-3335, decided January 15, 1999 by the Seventh Circuit Court of Appeals, reported at 1999 U.S. App. Lexis 493. This decision is important to the issues in this case and was rendered subsequent to the submission of Brief's by Petitioner and Respondent.

Facts and Holding in *Flight Attendants* Case

In the *Flight Attendants* case an association of flight attendants sought a declaration in the Tax Court under 26 U.S.C. sec. 7476 that the Internal Revenue Service had erred in determining that their employer, United Air Lines, could convert a retirement savings plan into a 401(k) plan without adverse tax consequences. The flight attendants sought a determination of adverse tax consequences on the conversion so that the savings plan's assets would become currently distributable to them rather than being retained in the 401(k) plan. The association's petition in the Tax Court was filed one business day later than the statutory period of ninety days following mailing of the notice of the determination by the Internal Revenue Service. The Government sought to dismiss the suit as being not timely filed. The association raised claims of equitable tolling and equitable estoppel to avoid the bar of the statute of limitations. These claims were rejected by the Tax Court on the ground that it had no jurisdiction to consider equitable defenses to the statute of limitations. In holding that the Tax Court did have jurisdiction to consider

equitable defenses relating to the statute of limitations Judge Posner stated at pages 7-8:

> "The argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable estoppel because it is a court of limited jurisdiction is fatuous. All federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981). We are given no reason to suppose that statutes of limitations are intended to be administered differently in the Tax Court than in the federal district courts, which share jurisdiction in federal tax cases with the Tax Court. It is true that the predecessor bodies to the Tax Court, such as the Board of Tax Appeals, were administrative agencies having more limited powers than a regular court. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 725 (1929); *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943). But the present Tax Court operates pretty indistinguishable from a federal district court. *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991). It differs in some respects—it has a specialized jurisdiction, obviously, and its judges are not Article III judges. But none of the differences bear on whether the court is empowered to recognize defenses to the statute of limitations. In context, the Supreme Court's dictum in *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam), that the Tax

Court lacks "general equitable powers" means only that the Tax Court is not empowered to override statutory limits on its power by forgiving interest and penalties that Congress has imposed for nonpayment of taxes—but then no court is, unless the imposition would be unconsititutional.

Without citing *McCoy* or *Dalm v. United States*, 494 U.S. 596, 611 and n. 8 (1990), which reserves the issue of the Tax Court's equitable powers, the Supreme Court in *Freytag v. Commissioner, supra*, 501 U.S. at 891, pointed out that the Tax Court has been given injunctive and other equitable powers; and numerous cases affirm the Tax Court's power to enforce equitable principles, such as contract reformation and judicial estoppel, without express congressional authorization. E.g., *Kelley v. Commissioner*, 45 F.3d 348, 351-52 (9th Cir. 1995); *Buchine v. Commissioner*, 20 F.3d 173, 177-78 (5th Cir. 1994); *Bokum v. Commissioner*, 992 F.2d 1136, 1140-41 (11th Cir. 1993); *Mueller v. Commissioner*, 101 T.C. 551 (1993); *Woods v. Commissioner*, 92 T.C. 776, 784-87 (1989). We are at a loss to understand why equitable tolling and equitable estoppel shouldn't be among the equitable principles applicable to proceedings in the Tax Court. *Bokum v. Commissioner, supra*, holds that they are among them. The overlap between the district courts' jurisdiction over refund suits and the Tax Court's jurisdiction over deficiency suits—both jurisdictions exclusive,

> but the taxpayer allowed to choose between them—makes it anomalous and confusing to multiply distinctions between the doctrines applied by the two types of court. Cf. *Shepherd v. Commissioner*, 147 F.3d 633 (7th Cir. 1998).

On the basis of this rationale and these authorities the Seventh Circuit held that the Tax Court did indeed have jurisdiction to consider equitable defenses to the bar of limitations in tax cases properly before it. In reaching this conclusion the Court found that on the facts before it the requirements for equitable estoppel were not present. It also declined to rule whether as a substantive matter the defense of equitable tolling was generally available in tax cases. It found that on the particular facts of the *Flight Attendants* case the requirements for this defense also could not be shown to be present. The decision thus determined that the Tax Court has jurisdiction to consider equitable defenses to the bar of limitations and should have considered these claims, but holds that the specific defenses raised in the case (equitable estoppel and equitable tolling) were inapplicable on the facts.

I. The *Flight Attendants* Case Provides Additional Reason To Grant Petition for Certorari Because It Is in Conflict With Decision of Sixth Circuit Court of Appeals Below On Issue Of Tax Court Jurisdiction To Consider Equitable Defenses

The *Flight Attendants* case held that the Tax Court has jurisdiction to consider equitable defenses regarding application of the statute of limitations. The case is significant to the pending Petition because it set aside the Tax Court's own determination that it had no jurisdiction to consider

equitable defenses to the bar of limitations. In doing so the Court of Appeals specifically considered and rejected the Government's contention that the Tax Court lacks such jurisdiction because it is a statutory court with limited jurisdictional powers which do not expressly provide for its consideration of equitable defenses. This identical argument is the fundamental basis upon which the present case below was decided by the Sixth Circuit Court of Appeals and upon which the Government has relied in opposing the Petition for Writ of Certiorari. The *Flight Attendants* case creates a conflict between the Sixth Circuit Court of Appeals and the Seventh Circuit Court of Appeals regarding the jurisdiction of the Tax Court to consider equitable defenses to the bar of limitations in tax cases. This conflict provides an additional and compelling reason for this Court to grant Certorari.

II. Equitable Recoupment Is Well Established As An Available Defense In Tax Cases Which The Tax Court Has Jurisdiction To Consider Under The Decision In The *Flight Attendants* Case

There are three equitable defenses to limitations which have been recognized by the courts. These defenses are equitable recoupment, equitable tolling and equitable estoppel. Each are based upon a showing of different factual circumstances. Equitable recoupment rests upon the showing of payment of a prior tax which is mutually inconsistent with a second tax upon the same transaction sought to be enforced in the main action. As recognized in *Flight Attendants, supra* at pg. 3, equitable tolling permits a prospective plaintiff to delay filing suit beyond the statute of limitations if despite due diligence on his part he can show that he could not obtain the information needed in order to determine, in time to sue within the deadline, whether he has a claim on which a suit

can be founded. And equitable estoppel allows delay in suing when it can be shown that the defendant (IRS) has taken steps to prevent the plaintiff from suing in time. Id.

Of these three equitable defenses, the one which is most firmly established and available to both parties in tax cases is equitable recoupment. This defense is regularly applied not only in litigation but also administratively in the collection of taxes by the Internal Revenue Service. The jurisdictional authority of the Tax Court to consider this defense either exists as collateral to its jurisdiction to resolve all of the substantive issues arising in tax cases properly before it, or it does not for want of an express statutory grant of jurisdiction over equitable claims as the Government contends. The Seventh Circuit Court of Appeals concluded that no legislative purpose exists for denying jurisdiction over equitable defenses to the Tax Court. It further found that the Government's reliance on dicta in case authorities to support its position was misplaced. This analysis is correct and sets forth the basis for error in the decision of the Sixth Circuit Court of Appeals below.

Conclusion

The issue presented by the Petition is important to the administration of the tax laws and there now exists a conflict between the Sixth and Seventh Circuit Court of Appeals. This Court should grant the Petition for Certiorari to resolve this conflict and determine that the Tax Court has jurisdiction to consider equitable defenses to the bar of limitations in the same manner as a district court.

Respectfully submitted.

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Nos. 97-3151 and 97-3335

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1999 U.S. App. LEXIS 493

November 9, 1998, Argued
January 15, 1999, Decided

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For COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee, (97-3151): Gary R. Allen, Gilbert S. Rothenberg, Ellen P. DelSole, DEPARTMENT OF JUSTICE, Tax Division, Appellate Section, Washington, DC USA. Sally J. Schornstheimer, DEPARTMENT OF JUSTICE, Tax Division, Washington, DC USA. For COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee, (97-3335):

Gary R. Allen, DEPARTMENT OF JUSTICE, Tax Division, Appellate Section, Washington, DC USA.

JUDGES: Before Posner, Chief Judge, and Cudahy and Coffey, Circuit Judges.

OPINIONBY: POSNER

OPINION: Posner, Chief Judge. The plaintiff, an association of flight attendants employed by United Air Lines, filed suit in the Tax Court under 26 U.S.C. § 7476 seeking a declaration that the Internal Revenue Service had erred in determining that the conversion of United's retirement savings plan for flight attendants into a 401(k) plan had no tax consequences. The association wanted the plan terminated rather than converted and the plan's assets distributed to the flight attendants, and it believed that this would happen if the new plan was denied the favorable tax status that the original plan had enjoyed.

The suit had to be filed "before the ninety-first day after the day after such notice is mailed." 26 U.S.C. § 7476(b)(5); Rule of Practice and Procedure of U.S. Tax Court 25(a). The notice was mailed to the association on August 23, 1996; the day after was August 24; the ninety-first day after August 24 was Saturday, November 23; the last day for filing the suit was therefore Friday, November 22, 1996. The association did not file until the following Monday, November 25. The Tax Court dismissed the suit as untimely. It also dismissed, as moot, United's motion to dismiss the suit on the ground that United was a necessary party and the association had failed to join it. Both the association and United appeal. The association invokes the doctrine of equitable tolling to justify its untimely filing. The government asserts that the doctrine

has no application to tax cases, and alternatively that the association has failed to make a case for equitable tolling.

We must consider first whether the association has standing to litigate over the IRS's grant of favorable tax status to United. Ordinarily a person does not have standing to complain about someone else's receipt of a tax benefit. Allen v. Wright, 468 U.S. 737, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). The injury is too attenuated for the dispute to reach the level of a real "case" or "controversy" in the sense that the Supreme Court has impressed on these terms found in Article III, section 2 of the Constitution. This case is different, however--is a real "case"--because the members of the association are participants in the retirement savings plan that was the subject of the IRS's ruling. They could certainly have challenged a denial of favorable tax treatment for the plan; it would have been an injury to them; the Internal Revenue Code and its implementing regulations make clear their right to seek declaratory relief. 26 U.S.C. § 7476(b)(1); 26 C.F.R. § 1.7476-1(b)(1); Self-Insurance Institute v. Korioth, 993 F.2d 479, 484 (5th Cir. 1993). It might seem that they would have no interest in challenging the grant of such treatment. But they do, because denial, while unfavorable to them in one sense, would have been favorable in another. It would have precipitated termination of the plan, because it would have required the participants to pay taxes on United's contributions to the plan and forbidden United to deduct those contributions from its taxable income, see 26 U.S.C. §§ 401, 402(b), 404(a)(5), 501, and these tax consequences would have been fatal to the plan's viability. See generally John D. Colombo, "Paying for Sins of the Master: An Analysis of the Tax Effects of Pension Plan Disqualification and a Proposal for Reform," 34 Arizona Law Review 53 (1992). The plan provided that upon termination its assets would be distributed to the

participants. Thus a successful challenge to the IRS's ruling would have initiated a sequence of actions the result of which would have been to put money in the pockets of the association's members. The total value of their benefits would have been less because of the loss of favorable tax treatment, but they prefer a bird in the hand to two birds in the bush; for them, continued favorable tax treatment is a harm.

Since the members of the association had Article III standing, so did the association. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977); North Shore Gas Co. v. EPA, 930 F.2d 1239, 1243 (7th Cir. 1991); Self-Insurance Institute v. Korioth, 993 F.2d 479, 484. But the statute under which the association sued authorizes only employees to sue, which may be why throughout the administrative proceedings in this case the IRS communicated directly with the association's president (who is an employee of United) rather than with the association as such. By the time the case had reached the Tax Court, everyone had forgotten that there might be an issue of the association's right to sue, although it is mentioned in a footnote in the government's brief in this court. The footnote points out that the government may not be sued without statutory authorization, Lane v. Pena, 518 U.S. 187, 192, 135 L. Ed. 2d 486, 116 S. Ct. 2092 (1996); United States v. Nordic Village, Inc., 503 U.S. 30, 33-34, 117 L. Ed. 2d 181, 112 S. Ct. 1011 (1992); United States v. Sherwood, 312 U.S. 584, 586, 85 L. Ed. 1058, 61 S. Ct. 767 (1941); Gibson v. Brown, 137 F.3d 992, 997-98 (7th Cir. 1998), here lacking. But it makes no practical difference whether the association is the proper party plaintiff, or its president. She is a participant in the plan and so has standing to seek declaratory relief against the IRS's ruling on the plan's tax status. We can thus treat this as a suit by her rather than by the association without

consequence. So let us move on to the issue of the timeliness of the suit.

The doctrine of equitable tolling permits a prospective plaintiff to delay filing suit beyond the statute of limitations if despite due diligence on his part he cannot obtain the information he needs in order to determine, in time to sue within the deadline, whether he has a claim on which a suit can be founded. A closely related doctrine, equitable estoppel, allows delay in suing when the defendant, in this case the IRS, has taken steps to prevent the plaintiff from suing in time. (On both doctrines, see, e.g., Wolin v. Smith Barney Inc., 83 F.3d 847, 852 (7th Cir. 1996); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-53 (7th Cir. 1990); Currier v. Radio Free Europe/Radio Liberty, Inc., 159 F.3d 1363, 1367 (D.C. Cir. 1998).) This case has a whiff of equitable estoppel because, as we are about to see, the basis of the claim of equitable tolling is the IRS's failure to give the association information that the association claims it needed in order to sue. Yet the association does not mention that doctrine, and so any reliance on it is waived; in any event, as will soon become apparent, the facts no more show equitable estoppel than they show equitable tolling.

United asked for a ruling from the IRS on the tax status of its new plan late in 1995. On August 14 of the following year, the association asked the IRS for copies of all comments or other correspondence that had been submitted to the IRS in connection with United's request. Nine days later the IRS mailed to the association's president a notice of a final determination (dated the previous day) that the new plan did qualify for continued favorable tax treatment. It was this mailing that set the period for the association to challenge the determination running, and the period expired as we said on

November 22. The IRS had not replied to the association's request for comments. On the contrary, on November 15 the IRS had notified the association's president that it had forwarded her request to the appropriate office for consideration. She should have known that it was unlikely, to say the least, that a response would be forthcoming in time for the association to prepare a pleading due a week later. And in fact the IRS did not reply until February of the following year, when it told the association that it had received no comments apart from those submitted by the association itself. Despite not having received any comments, the association filed its suit three days (only one business day) after the November 22 deadline expired.

When asked at oral argument how, if the comments (or at least a denial that there were any comments) were essential to its being able to file suit, the association was able to file suit before it received either the comments or the denial, the association's lawyer said that the petition for declaratory relief that he filed on November 25, 1996, was "unreal," that it was really a request for additional time for filing the "real" petition. But if it was "unreal," then the Tax Court was right to dismiss it irrespective of any deadline considerations, and the association should have filed the "real" petition after it learned in February of 1997 that there were no comments. Because the association has never filed what it considers a "real" petition, we cannot gauge what difference it would make to a challenger's ability to file a petition to have in hand either the comments or a denial that there were comments. Probably very little. The "unreal" petition asked the Tax Court to overrule the IRS's determination and rescind the plan's favorable tax treatment. No more was required in an initial pleading, which under the rules of the Tax Court need only be a "clear and concise statement of each ground . . . and

the facts to support each ground." Rule of Practice and Procedure of the U.S. Tax Court 211(c)(4)(D).

A regulation requires the applicant (here United) for IRS approval of favorable tax treatment of a retirement plan to make any comments received on the application "immediately" available to all parties. 26 C.F.R. § 601.201 (o)(3)(xvii); see also Stevens v. Commissioner, 1985 T.C. Memo 192, 49 T.C.M. (CCH) 1261, 1267 (1985). The association did not take advantage of this regulation; instead it asked the IRS for the comments. It offers no excuse for this blunder.

Statutes of limitations are not merely traps for the unwary; they serve important social purposes. Board of Regents v. Tomanio, 446 U.S. 478, 487, 64 L. Ed. 2d 440, 100 S. Ct. 1790 (1980); United States v. Kubrick, 444 U.S. 111, 117, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979); Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1165-66 (7th Cir. 1996); Resolution Trust Corp. v. Seale, 13 F.3d 850, 852 (5th Cir. 1994); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1393-94 (7th Cir. 1990) (concurring opinion). This is conspicuously the case with respect to determinations of the tax status of retirement plans. Because the alteration of that status as a consequence of litigation can require a revision of tax liabilities for past years, disturbing expectations and entailing heavy administrative expenses, it is vital that such litigation be instituted as soon as possible after the initial determination of the plan's status; that may be why the statute of limitations is so short. It is equally vital that a party who wants to appeal to the doctrine of equitable tolling to excuse a late filing show (as the doctrine requires him to do, e.g., Wolin v. Smith Barney Inc., supra, 83 F.3d at 852; Cada v. Baxter Healthcare Corp., supra, 920 F.2d at 451; Currier v. Radio Free Europe/Radio Liberty, Inc., supra, 159 F.3d at

1367) that he tried diligently to file within the deadline or as soon afterwards as possible. The flight attendants' association did not exhibit diligence. If it could file suit on November 25 it could have filed three days earlier; nothing had changed in the interim. If, as we do not for a moment believe, it could not file a "real" suit until February 1997, when it learned that there were no comments, it should have filed a real petition then. Had that petition been turned down as untimely, at least we would have a concrete record on which to base a judgment about a challenger's actual need for such comments. And rather than sit on its hands waiting for an agency not known for its celerity to respond to a request that should have been directed to the applicant for the tax ruling, the association should have complied with the regulation and directed its request to United.

Since, so far as appears, the association could have sued in time notwithstanding the IRS's foot dragging, the latter's conduct or rather nonconduct did not work an estoppel because it did not make it impossible for the association to sue in time. It is implicit in the doctrine that the conduct alleged as the basis for the estoppel have been the cause of the plaintiff's not suing in time. See Speer v. Rand McNally & Co., 123 F.3d 658, 663 (7th Cir. 1997); Cange v. Stotler & Co., 826 F.2d 581, 587-88 (7th Cir. 1987); Redman v. U.S. West Business Resources, Inc., 153 F.3d 691, 695 (8th Cir. 1998). It is therefore immaterial whether, as we believe, diligence is not an element of equitable estoppel, Wolin v. Smith Barney Inc., supra, 83 F.3d at 852, or, as other courts believe, Benitez-Pons v. Puerto Rico, 136 F.3d 54, 63 (1st Cir. 1998); Robinson v. Dalton, 107 F.3d 1018, 1023 (3d Cir. 1997), it is. (In Klehr v. A.O. Smith Corp., 521 U.S. 179, [*12] 194, 138 L. Ed. 2d 373, 117 S. Ct. 1984 (1997), the Supreme Court noted the conflict but left it unresolved.) For however that issue is

resolved, the IRS's foot-dragging and failure to remind the association that it could ask for the comments directly from United are not the kind of obstructive conduct that would warrant estopping a defendant to plead the statute of limitations. Not being prompt and helpful is a lot different from actually preventing a plaintiff from suing in time. See, e.g., Speer v. Rand McNally & Co., supra, 123 F.3d at 663; Redman v. U.S. West Business Resources, Inc., supra, 153 F.3d at 695.

Because the association has failed to make a case for equitable tolling, we need not decide (as the parties invite us to do) whether the doctrine may ever be invoked in a federal tax case. In Irwin v. Department of Veterans Affairs, 498 U.S. 89, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990), the Supreme Court held that the doctrine does apply to suits against the federal government, but in United States v. Brockamp, 519 U.S. 347, 136 L. Ed. 2d 818, 117 S. Ct. 849 (1997), it carved an exception for tax refund suits. See also RHI Holdings, Inc. v. United States, 142 F.3d 1459, 1461-63 (Fed. Cir. 1998). The government asks us, on the authority of Brockamp, to broaden the exception to cover the entire tax code. But Brockamp is not broadly written. The Court pointed to emphatic statutory language not paralleled in the sections of the code at issue in this case indicating Congress's disinclination to permit any delays in the institution of tax refund litigation and to the administrative complexities that would ensue from injecting the complex, nuanced, case-by-case doctrine of equitable tolling into the assembly-line production of tax refunds in response to the enormous number of refund claims (more than a hundred million) filed every year.

Taking a tack independent of Brockamp, the government argues that because the Tax Court, being a court of limited

jurisdiction (Brockamp was a refund case and thus originated in a district court rather than the Tax Court), lacks the power to recognize equitable defenses not specified by Congress. This is also the position of the Tax Court. Rule of Practice and Procedure of U.S. Tax Court 210(c)(3); Calvert Anesthesia Associates v. Commissioner, 110 T.C. 285 (1998); Estate of Rosenberg v. Commissioner, 73 T.C. 1014, 1017-18 (1980). Rule 210(c)(3) states that the [*14] Tax Court does not have "jurisdiction" over a suit for declaratory judgment under 26 U.S.C. § 7476 if it is filed after the statutory deadline.

Had Congress delegated to the Tax Court the power to establish nonwaivable jurisdictional rules, akin to those that limit the time for taking appeals, e.g., Fed. R. App. P. 26(b); Torres v. INS, 144 F.3d 472, 475 (7th Cir. 1998); Nowak v. INS, 94 F.3d 390, 391 (7th Cir. 1996), we would be bound. But neither the government, nor the Tax Court in the Calvert or Rosenberg decisions, has claimed this; nor have we found any indication that this was Congress's intention in authorizing the Tax Court to adopt procedural rules. 26 U.S.C. § 7453. If, therefore, Rule 210(c)(3) is merely the Tax Court's interpretation of the Internal Revenue Code, and of the principles of federal common law that guide the resolution of procedural issues to which the Code does not speak, we are not bound. The Tax Court is a trial court rather than an appellate court, and its views on questions of law are not entitled to deference from the courts of appeals. Prussner v. United States, 896 F.2d 218, 224 (7th Cir. 1990) (en banc); Cadwallader v. Commissioner, 919 F.2d 1273, 1274 (7th Cir. 1990).

The argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable estoppel because it is a court of limited jurisdiction is fatuous. All federal courts are

courts of limited jurisdiction. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981). We are given no reason to suppose that statutes of limitations are intended to be administered differently in the Tax Court than in the federal district courts, which share jurisdiction in federal tax cases with the Tax Court. It is true that the predecessor bodies to the Tax Court, such as the Board of Tax Appeals, were administrative agencies having more limited powers than a regular court. Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 725, 73 L. Ed. 918, 49 S. Ct. 499 (1929); Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418, 88 L. Ed. 139, 64 S. Ct. 184 (1943). But the present Tax Court operates pretty indistinguishably from a federal district court. Freytag v. Commissioner, 501 U.S. 868, 891, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991). It differs in some respects--it has a specialized jurisdiction, obviously, and its judges are not Article III judges. But none of the differences bear on whether the court is empowered to recognize defenses to the statute of limitations. In context, the Supreme Court's dictum in Commissioner v. McCoy, 484 U.S. 3, 7, 98 L. Ed. 2d 2, 108 S. Ct. 217 (1987) (per curiam), that the Tax Court lacks "general equitable powers" means only that the Tax Court is not empowered to override statutory limits on its power by forgiving interest and penalties that Congress has imposed for nonpayment of taxes--but then no court is, unless the imposition would be unconstitutional.

Without citing McCoy or Dalm v. United States, 494 U.S. 596, 611, 108 L. Ed. 2d 548, 110 S. Ct. 1361 and n. 8 (1990), which reserves the issue of the Tax Court's equitable powers, the Supreme Court in Freytag v. Commissioner, supra, 501 U.S. at 891, pointed out that the Tax Court has been given

injunctive and other equitable powers; and numerous cases affirm the Tax Court's power to enforce equitable principles, such as contract reformation and judicial estoppel, without express congressional authorization. E.g., Kelley v. Commissioner, 45 F.3d 348, 351-52 (9th Cir. 1995); Buchine v. Commissioner, 20 F.3d 173, 177-78 (5th Cir. 1994); Bokum v. Commissioner, 992 F.2d 1136, 1140-41 (11th Cir. 1993); Mueller v. Commissioner, 101 T.C. 551 (1993); Woods v. Commissioner, 92 T.C. 776, 784-87 (1989). We are at a loss to understand why equitable tolling and equitable estoppel shouldn't be among the equitable principles applicable to proceedings in the Tax Court. Bokum v. Commissioner, supra, holds that they are among them. The overlap between the district courts' jurisdiction over refund suits and the Tax Court's jurisdiction over deficiency suits--both jurisdictions exclusive, but the taxpayer allowed to choose between them--makes it anomalous and confusing to multiply distinctions between the doctrines applied by the two types of court. Cf. Shepherd v. Commissioner, 147 F.3d 633 (7th Cir. 1998).

At argument the government's lawyer emphasized quite properly not dry legalisms about jurisdiction but instead the importance of prompt resolution of issues involving the tax status of retirement plans, and this may justify the extension of the holding of Brockamp to the present case after all. But that we need not decide.

Our disposition of the association's appeal moots United's appeal. United had moved to dismiss the suit because the association had failed to join a necessary party, namely United. Rule of Practice and Procedure of U.S. Tax Court 215(a)(3). The Tax Court denied the motion as moot when it ruled that it had no jurisdiction over the suit because it had been filed late. Although United has appealed from that denial, the

appeal is conditional on our reversing the Tax Court's dismissal of the suit, which we have not done.

So: No. 97-3151 is affirmed and No. 97-3335 is dismissed as moot.